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Nos. 56 and 57

# In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES, PETITIONER

*v.*

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

UNITED STATES, PETITIONER

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 56

UNITED STATES, PETITIONER

*v.*

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE PROPERTIES AND ASSETS OF SEABOARD AIR LINE RAILWAY COMPANY

No. 57

UNITED STATES, PETITIONER

*v.*

ATLANTIC COAST LINE RAILROAD COMPANY

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

In No. 56, the opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 30–33) is reported in 152 F. 2d 228; the

opinion of the District Court of the United States for the Eastern District of Virginia, Norfolk Division (R. 18–28) is reported in 60 F. Supp. 433. In No. 57, the opinion of the Circuit Court of Appeals (R. 20–21) is reported in 152 F. 2d 230; the opinion of the District Court of the United States for the Eastern District of Virginia, Richmond Division (R. 14–18), is unreported.[1]

## JURISDICTION

In both cases, the judgments of the Circuit Court of Appeals were entered on December 13, 1945 (No. 56, R. 33; No. 57, R. 21). The petitions for writs of certiorari were filed on March 12, 1946, and were granted on April 29, 1946 (No. 56, R. 35; No. 57, R. 23). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether phosphates (in No. 56) and phosphate rock (in No. 56 and No. 57), "defense articles" within the definition of the Lend-Lease Act, owned by the United States and moving in August and September of 1941 on Government bills of lading on consignment to the British

[1] These cases, Nos. 56 and 57, although not formally consolidated, were argued together in the court below (No. 57, R. 21). Since they present identical questions, they are being briefed together in this Court.

Ministry of War Transport under the Lend-Lease Act for use as farm fertilizer in Great Britain, were "military or naval property of the United States moving for military or naval and not for civil use" within the meaning of Section 321 (a) of the Transportation Act of 1940, and hence entitled to move at land-grant rather than commercial freight rates.

### STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940, 54 Stat. 898, 49 U. S. C., Sec. 65 (a), and of the Lend-Lease Act, 55 Stat. 31, 22 U. S. C., Supp. V, Secs. 411–419, are set forth in the Appendix, pp. 109–116.

### STATEMENT

The facts of both cases are similar. In each case, these facts were stipulated by the parties or admitted by the pleadings, and found by the courts below to be as stipulated and admitted.

No. 56

During August 1941, 78 cars of phosphate rock and superphosphate were shipped on Government bills of lading over respondents' railroad. These carloads had been purchased by the United States, were its property, and were consigned to the British Ministry of War Transport, a duly authorized representative in the United States of His Majesty's Government in the United King-

dom (R. 6–8; 19). They were being exported to Great Britain under the Lend-Lease Act for use, in the form of farm fertilizer, as part of Britain's revised wartime program for intensified production of food (R. 5, 8, 15).

It is agreed that all these phosphate shipments were intended for export under the lend-lease program and were "defense articles" as defined in Section 2 of the Lend-Lease Act; that when requisition was made by any country, the defense of which the President of the United States deemed vital to the defense of the United States, such requisition was considered and scrutinized; that it was accepted or rejected in accordance with the determination by the President or his representative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the requisitioned materials would promote the defense of the United States in accordance with the provisions of the Lend-Lease Act; that "In 1941, at the times the requisitions for the materials involved in the counterclaim were made, approved and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply"; that it was necessary for Great Britain to intensify production of food and for this purpose to use phosphate fertilizers; that

"the shipments of phosphate rock and superphosphate comprised a part of that program"; that "Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act"; and that in 1941, the United States was the only practical source from which Great Britain could acquire such materials (R. 15).

*In September 1941*, respondents billed the United States for the transportation charges on these shipments at the "commercial rate", and the United States paid the bills as rendered (R. 7). Thereafter, in August 1942, the General Accounting Office took formal exception to these payments, on the ground that the shipments were of military property and subject to land-grant rate deductions, and notified the Seaboard Air Line Railway Company accordingly (R. 7–8, 11). The difference between the "commercial rate", which the United States had paid, and the "land-grant" rate to which it was believed to be entitled on these shipments, amounted to $637.54 (R. 7–8). As provided in Section 322 of the Transportation Act of 1940 (Appendix, pp. 110–111), the Government recouped this difference by deducting, in September 1942, the sum of $637.54 from the amount of $733.79 currently owing to the Sea-

board by the Government for certain unrelated freight shipments of wood pulp, and paid respondents the balance of $96.25 (R. 6, 19). Respondents accepted that amount under protest and as part payment only (R. 6), and instituted this action under the Tucker Act in the District Court of the United States for the Eastern District of Virginia to recover the $637.54 withheld (R. 1–2). The United States admitted that respondents were entitled to the sum of $733.79 for the transportation of the wood pulp, but filed a counterclaim for $637.54, to recover the asserted overpayment on the shipments of phosphate rock and superphosphate, and asked that this amount be set off against the respondents' claim, and that the complaint be dismissed (R. 4–5). Respondents' reply denied the alleged overpayment (R. 5–6).

The controversy thus turns solely upon the applicability of land-grant rate reductions, under the Transportation Act of 1940, to the phosphate shipments involved. The parties have stipulated (R. 8) that if the phosphates "were at the time of their transportation by the Seaboard 'military or naval property of the United States moving for military or naval and not for civil use', within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, the counterclaim asserted by the United States is valid and should be allowed in the amount stated. Other-

wise judgment should be rendered in accordance with the prayer of the petition herein."[2]

The District Court held that the respondent was entitled to the full commercial rates, and accordingly entered judgment for respondents for $637.54, and dismissed the Government's counterclaim (R. 28–29). On appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of the District Court was affirmed (R. 33).

No. 57

In August and September 1941, a number of cars of phosphate rock, which had been purchased by the United States, moved on Government bills of lading over the respondent's railroad from Agricola, Pierce, and Brewster, Florida, to Tampa, Florida, also consigned to the British Ministry of War Transport (R. 15–16). These shipments were for export to Great Britain, under the Lend-Lease Act, to be used there as farm fertilizer. The parties made the same stipulations as those in No. 56 concerning the character of the phosphate rock as "defense articles" under the Lend-Lease Act, the procedure for fulfilling requisitions under that Act, and Great Britain's need for and use of phos-

[2] The Seaboard duly filed with the Secretary of the Interior the release of public land claims provided for in Section 321 (b) of the Transportation Act of 1940 (R. 8), and the provisions of Section 321 (a) are therefore fully applicable to its operations.

phate rock in 1941 in order to increase the production of food (R. 17–18).

Respondent billed petitioner for, and petitioner paid, the transportation charges on these shipments at the "commercial rates" (R. 16). Thereafter, in auditing these bills, the General Accounting Office excepted to these payments on the ground that land-grant rates were applicable, and determined that $4,192.33 had been overpaid (R. 16). This sum was deducted by the United States from subsequent bills admittedly due the respondent (R. 1, 15), and respondent instituted this action in the District Court for the Eastern District of Virginia to recover the amounts so withheld (R. 1). As in No. 56, the United States filed a counterclaim for the same sum, and prayed for a set-off and dismissal of the railroad's claim (R. 7–9).

Respondent is not a land-grant railroad and is under no statutory compulsion to accord the Government any reduction in rates, but it has entered into an equalization agreement, dated April 14, 1938, with the United States, under which it has agreed to accept land-grant rates for shipments which the Government could alternatively move over a land-grant road (R. 17). Agricola, Pierce, and Brewster, Florida (the points from which the phosphate rock moved), are stations on both the respondent's line and on the Seaboard Air Line Railway, which is a land-grant railroad (R. 17). Accordingly, it is agreed that the

United States is entitled to secure land-grant deductions from Atlantic Coast Line, the respondent in No. 57, if the Seaboard would have been subject to land-grant rates for carrying similar shipments.[3]

The District Court found that "the facts stipulated are not in any material respect different from the facts" in No. 56 (R. 18), and "under the stipulated facts and on authority of that case", ruled that the freight rates applicable to the shipments are the full commercial rates (R. 18). Judgment was entered in favor of respondent for $4,192.33, and the Government's counterclaim was dismissed (R. 19.) On appeal, the Circuit Court of Appeals for the Fourth Circuit held that "the facts in this case and the question arising on these facts differ in no essential respects from the facts and the question involved" in No. 56, and affirmed the judgment of the District Court "for the reasons set out in our opinion" in that case (R. 21).

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding that the United States was not entitled to land-grant rates on the shipment of

[3] In No. 57, as in No. 56, it is expressly stipulated that the Seaboard has properly filed its release of land claims under Section 321 (b) of the Transportation Act of 1940 (R. 17). See footnote 2, *supra*, p. 7.

phosphates and phosphate rock under the Lend-Lease Act for use in Great Britain.

2. In holding that such phosphates, belonging to the United States and exported to Great Britain pursuant to the Lend-Lease Act for use as farm fertilizer in Great Britain, were not "military or naval property of the United States" within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. In holding that such phosphates, belonging to the United States and shipped on consignment to the British Ministry of War Transport, pursuant to the Lend-Lease Act, for export to Great Britain for use there as farm fertilizer, were not "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

4. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported pursuant to the Lend-Lease Act, are "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

5. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported under that Act, are "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

6. In affirming the judgments of the district court which had entered judgments for respondents and dismissed petitioner's counter-claims.

## SUMMARY OF ARGUMENT

Section 321 (a) of the Transportation Act of 1940 provides that "military or naval property of the United States moving for military or naval and not for civil use" is entitled to reduced land-grant rates. The application of this provision to shipments under the Lend-Lease Act must be determined against the background of the history of the times and the purposes the Congress sought to attain in enacting these statutes. So read, it seems clear that property moving under the Lend-Lease Act, the primary purpose of which was to secure the military defense of the United States, falls within the area reserved by Congress in 1940 for reduced railroad rates.

1. The Lend-Lease Act was a military measure designed solely to strengthen the national defense. Its purpose was to protect and defend the United States by making available to the nations fighting the Axis powers an arsenal of supplies to be used for fortifying the military power of those nations, and sustaining them as our first line of defense. Lend-lease shipments consisted of defense articles shipped in the interests of our national defense to maintain the military security of a country the defense of which the President

deemed vital to the defense of the United States. These executive determinations conclusively prove the moving purpose of lend-lease shipments to be purely military. The legislative history and the administration of the Act also emphasize the military character of the Act. Military considerations determined each transfer, and lend-lease and reverse lend-lease together constituted the dominant system of combined war supply.

Respondents and the lower courts rely upon references, in various reports on lend-lease operations, which categorize some of the defense materials as "civilian supplies," "military items," or "non-military goods," to prove that many lend-lease shipments moved for "civil" purposes. But these reports used such terms elastically and for statistical reasons only. For instance, the content of the different categories changes with the varying demands of bookkeeping convenience; the characterization of "military" is generally restricted to arms, munitions, and weapons of war or other "military type" property; certain property which would be admittedly entitled to land-grant rates is listed as "non-military," "agricultural," or "industrial." Moreover, supplies destined for direct civilian consumption in liberated areas were shipped because they contributed to the effectiveness and safety of the military operations of our own and allied armed forces. In short, the nomenclature adopted for the purposes

of some statistical sections of the lend-lease reports is without significance here. On the contrary, the substance of the reports shows that lend-lease shipments moved for military or naval and not for civilian ends.

2. The Court should not independently determine the military necessity for each lend-lease transfer, but should accept the executive findings under the Lend-Lease Act as conclusive of the military purpose of the shipment. However, if such an inquiry is to be made in each case, it is clear that the phosphates involved here were military property moving for military use. It is more than just a slogan that food is a weapon of war. The importance of adequate food to the military survival of a beleaguered nation cannot now be questioned, and phosphates are everywhere recognized as a signficant factor in increasing food production. In 1941, submarine warfare and the occupation of Europe had enormously reduced Great Britain's vital imports of food, and were threatening to starve her into complete defeat. Lend-lease food tided Britain over at the time of her most serious crisis of the war, and lend-lease phosphates had a significant part in raising her domestic food production from some 40% in peacetime to about 70% of her needs in 1943. This increased supply fed Britain's armed forces, her civilians who were totally mobilized for war, and, later, in some degree, our own armed forces

through reverse lend-lease. Above all, the production of added food stocks enabled Great Britain to continue to wage effective war against the Axis powers, and measurably contributed to the final victory.

3. In enacting Section 321 (a) in 1940, Congress aimed to retain land-grant rates in the interests of national defense, but to relieve the railroads of their obligation to carry property moving for relief, public works, or other nondefense governmental purposes. The quantity of these nondefense shipments had greatly mounted during the prior decade, and the railroads were demanding some increase for their then shrunken revenues. The legislative history of Section 321 (a), considered in the light of Congress' intense concern in 1940 with our military defense, indicates that Congress desired to go no further than to conform the present-day land-grant rate rules to the original nineteenth century situation when most of the Government property carried over the railroads was national defense material. Congress had no intention of hampering or increasing the cost of our growing defense preparations, or of discriminating against a large portion of the supplies essential to the national defense effort. The history of the successive but futile efforts, from 1942 to 1946, to abolish land-grant rates, prior to the termination of hostilities, confirms this view.

4. The only interpretation which will harmonize this Congressional purpose with the terms of the land-grant proviso of Section 321 (a) is to apply the reduced rates to all Government property moving to advance the national defense or to promote the prosecution of the war. The test is the pragmatic one of the use to which the property is to be put. Military or naval character is determined not by the type of property but by the use for which it is moving. Property being transported for war or defense purposes is therefore military or naval property; the words "military" and "naval," not being words of art, are certainly elastic enough to bear this interpretation. Under this reading, the cautionary words "and not for civil use" underscore the fact that, to entitle the Government to reduced rates, the war or national defense purpose of the shipments must be real and substantial, and not illusory or far-fetched.

Narrower interpretations of Section 321 (a) are open to serious objections. Land-grant rate history, as well as the legislative history of the Transportation Act of 1940, shows that Congress did not limit the applicability of reduced rates to the limited category of "arms," "munitions," or "implements of war." It is highly improbable that Congress could have intended the War and Navy Departments alone to secure the bene-

fits of these lower tariffs. A third narrow interpretation, restricting land-grant rates to property destined for ultimate use by or under the control of armed forces, wholly disregards the integrated character of modern war, and runs counter to continued Congressional recognition both of the importance of civilian agencies in, and the breadth of materials needed for, our military defense. Finally, any doubt as to the correct reading of the statute should be resolved by application of the rule that grants of public rights and relinquishments of public interests are to be construed liberally in favor of the Government and strictly against the donee.

## ARGUMENT

The decision of these cases—as well as the companion case, *Northern Pac. Ry. Co.* v. *United States,* No. 400—depends upon the meaning of the few words in Section 321 (a) of the Transportation Act of 1940 which provide that "military or naval property of the United States moving for military or naval and not for civil use" shall continue to be transported at the comparatively low land-grant rail rates. This provision became law on September 18, 1940. Six months later, on March 11, 1941, President Roosevelt signed the Lend-Lease Act, and shipments to beleaguered Britain and the other nations fighting Germany began to flow over American railways.

These supplies, destined for countries the defense of which the President had deemed "vital" to the defense of the United States, ranged from peanuts to blockbusters. All were being sent for a single purpose: to bolster the military security of the country to which they were assigned.

Were these lend-lease shipments "military or naval property * * * moving for military or naval and not for civil use"? The court below held that the lend-lease supplies here involved—fertilizer to be used on farms in England for producing food—did not come within the statute because they could not be considered "military or naval" property within the "generally accepted meaning" of these terms (No. 56, R. 32). As construed by the court below, Section 321 (a) of the Transportation Act of 1940 requires that, regardless of difficulties of application, a line must be drawn between two types of lend-lease shipments, depending upon whether they are "military or naval" or "civil" in character. Since farm fertilizer would not normally be placed in the same category as guns and planes and bombs, and since the shipments here were not intended for "military" use by the conventional armed forces, the court below treated them as "civil" goods not entitled to move at land-grant rates.

The Government believes that the interpretation placed on the Transportation Act of 1940 by the court below is unduly restrictive, and that all

available aids to construction support the conclusion that defense supplies shipped under the Lend-Lease Act, whatever character and purpose they might possess in a normal peace-time economy, were in a very real sense moving for a military use. The Lend-Lease Act was a military measure designed to protect and defend the United States by making available to friendly nations an arsenal of supplies to be used for fortifying the military power of such nations and sustaining them as our first line of defense. Accordingly, all goods shipped under the Lend-Lease Act should be regarded as "military" property for purposes of the Transportation Act of 1940. This conclusion seems to us not only to be correct as a matter of statutory construction; it also obviates the overwhelming practical difficulties of application which would result if respondents' interpretation were adopted.

The duty of construction which rests upon the Court in these cases is not easy. The language of the Transportation Act of 1940—where the process of construction must begin—provides only an inconclusive answer. There are few legal terms which are less precise in their application and scope than "military", "naval", and "civil". If we look only to the statutory language, neither party could confidently argue for its interpretation of the provision. Nor does the legislative history in the usual sense, i. e., as embodied in

the committee reports and hearings and in the debates, contain any conclusive evidence as to the legislative will. Resort must be had to more subtle and elusive aids to construction; and in our judgment the most persuasive evidence as to the meaning and inter-relationship of these statutes is to be found in the history of the times in which they were enacted.[4] Congress has not provided artistic language; but from the history and background of the enactments here involved one can clearly discern a legislative attitude and approach which can reliably be used as the touchstone of judicial construction.

We recognize that such an historical inquiry is not merely treacherous; it is also likely to be tiresome. To recapture the legislative environment from which emerged these historic measures—the Transportation Act of 1940 and the Lend-Lease Act of 1941—calls for a recital of detail which requires this brief to be of some length. It is hoped, however, that this examination of the background and development of these laws may aid the Court in reaching its decision.

[4] Referring to another statute, Mr. Justice Murphy's opinion for the Court in *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273, made a general observation which is pertinent here: "The Act was the product of a period, and 'courts, in construing a statute, may with propriety recur to the history of the times when it was passed.' *United States* v. *Union Pacific R. Co.*, 91 U. S. 72, 79."

# I

## THE LEND-LEASE ACT WAS ENACTED AND ADMINISTERED AS A MILITARY MEASURE, AND "DEFENSE ARTICLES" SHIPPED UNDER THE ACT WERE MILITARY PROPERTY MOVING FOR A MILITARY USE

### A. THE PRIMARY PURPOSE OF THE LEND-LEASE ACT WAS TO SECURE THE MILITARY DEFENSE OF THE UNITED STATES

That the Lend-Lease Act was a military measure designed to strengthen the national defense is evidenced by its text, the course of its evolution and enactment in Congress, and the considerations which governed its administration.

1. *The text of the statute.*—The Lend-Lease Act is entitled "An Act to Promote the Defense of the United States." Section 3 (a) provides that "the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government * * * To sell, transfer title to, exchange, lease, lend, or otherwise dispose of" "any defense article" to "the government of any country whose defense the President deems vital to the defense of the United States." "Defense article" is defined in Section 2 (a) as including "Any agricultural, industrial or other commodity or article for defense", in addition to weapons, munitions, aircraft, vessels and boats, means of making and repairing them, and component parts

thereof. The parties have agreed, and the court below has found, that during the period of active lend-lease shipments, when requisition was made by any country the defense of which the President deemed vital to the defense of the United States, such requisition was carefully considered and scrutinized; it was then accepted, modified or rejected in accordance with the determination by the President, or his duly authorized representative (such as the Lend-Lease or the Foreign Economic Administrator) as to whether or not shipment of the requisitioned materials would promote the defense of the United States in accordance with the provisions of the Lend-Lease Act. (No. 56, R. 15; No. 57, R. 17). Accordingly, lend-lease shipments such as the phosphates involved here always consisted of articles useful for defense, in the process of transfer to a country the defense of which the President had found to be vital to our national defense, and pursuant to a finding by the executive branch of the Government that the defense of the United States would be promoted by the shipment. These executive determinations are conclusive, and neither respondents nor the lower courts have asserted otherwise. Cf. *United States* v. *Bush & Co.*, 310 U. S. 371, 380; *United States* v. *Curtiss Wright Export Corp.*, 299 U. S. 304, 314; *Hirabayashi* v. *United States*, 320 U. S. 81, 93.

2. *Legislative history.*—The history of the Act further demonstrates the truth of the assertion,

to which the Circuit Court of Appeals gave its "cheerful assent", that "the Lend-Lease Act was enacted as a defense measure, not as a program of humanitarian charity." (No. 56, R. 31).[5] This was the keynote of President Roosevelt in the first public notice of the proposal, on December 17, 1940, when he said that "the best immediate defense of the United States is the success of Great Britain defending itself; and that, therefore, quite aside from our historic and current interest in the survival of democracy in the world as a whole, it is equally important from a selfish point of view and of American defense, that we should do everything possible to help the British Empire to defend itself."[6] In his state-of-the-union message of January 6, 1941, President Roosevelt called for legislative authorization to "act as an arsenal" for the nations engaged in actual war with aggressor nations.[7] In response to this request, the Lend-Lease Bill, H. R. 1776, was introduced on January 10, 1941. At the hearings before the Committee on Foreign Affairs of the House of Representatives, the Secretaries of State, War, Navy, and the Treasury, and the Director General of the Office of

[5] A detailed account of the genesis of the Lend-Lease Bill and of the debates, public and Congressional, is contained in Stettinius, *Lend-Lease, Weapon for Victory*, Chaps. VI and VII.

[6] Stettinius, *Lend-Lease, Weapon for Victory* (1944), pp. 65–66.

[7] H. Doc. No. 1, 77th Cong., 1st Sess., p. 4.

Production Management appeared publicly to support the bill as a military measure essential to the national defense. (See Hearings before the House Committee on Foreign Affairs, 77th Cong., 1st Sess. on H. R. 1776). Secretary of State Cordell Hull outlined the ever-growing course of aggression by Germany and Japan which made it "increasingly apparent that mankind is today face to face, not with regional wars or isolated conflicts, but with an organized, ruthless, and implacable movement of steadily expanding conquest. * * * [We] must not be diverted * * * from our firm determination to create means and conditions of self-defense wherever and in whatever form we find essential to our own security. * * * [The proposed bill] sets up machinery which will enable us to make the most effective use of our resources for our own needs and for the needs of those whom, in our own self-defense, we are determined thus to aid." (Hearings, pp. 5, 7.)[8] Secretary of

[8] Secretary Hull also expressed his firm conviction that "the most practical course in prosecuting as speedily and effectively as possible steps in our national defense is not merely to arm here at home and wait for the invader to cross our border, but * * * to resist by aiding those who are now right in line between us and the invader and resisting to the utmost" (Hearings, pp. 13, 16). "As I said many times here this morning, the attitude of this Government is one of defending itself primarily by aiding another country already attacked to defend itself" (p. 26). "Let us get back to the purpose of the bill which is to aid in the defense of the United States by rendering

War Henry L. Stimson testified that the bill was "based upon the proposition that the effective defense of this country in the pending emergency depends in large part upon our giving effective help to Great Britain and perhaps to other nations defending themselves against the Axis Powers" (p. 85), and that "the proposed bill is a forthright and clear grant of power which will enable the President to place in operation the best and simplest plan to carry out a national policy many times stated and endorsed. It substantially assists us in the job of caring for our own needs and the needs of those whose defense is a matter of vital importance to us" (p. 90). Secretary of the Navy Frank Knox repeatedly stressed the importance to our own naval defense of the survival of Great Britain and its fleet (pp. 156–158; 181–184): "we will act in our best national interests, therefore, if, while increasing our naval power as fast as we can, we provide the British Commonwealth with the means that will bring her through this tragic crisis" (p. 158). Similarly, the record of the Senate hearings is replete with avowals of the necessity of lend-lease for the defense of the United States. (See Hear-

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certain *military* aid to Great Britain" (p. 33, italics added). "The matter we have been discussing all day here is a matter of promoting our defense, frankly by furnishing *military* supplies to a country that is resisting the same attack that is moving our way, or at least that is creating imminent danger to the hemisphere and hence to us" (pp. 38–39, italics added).

ings before the Senate Committee on Foreign Relations, 77th Cong., 1st Sess., on S. 275, pp. 3 *et seq.*, 87–90, 122, 177–179, 180–182.)

One cannot go through the committee reports and the Congressional debates without sensing again the urgency and gravity of the military situation portrayed by our responsible leaders in both the legislative and executive branches of the Government, and the extent to which they regarded lend-lease as desperately essential to the common defense. The Committee on Foreign Affairs of the House stated that the bill was designed "for our own national security, to aid Britain and those other nations whose defense is vital to the defense of the United States," and that its prompt enactment was "of the highest importance to the vital interests of our country—and even of our civilization."[9] The Senate Committee on Foreign Affairs concluded: "To the end that we may have peace the bill authorizes aid to be given promptly to those nations whose defense is vital to ours. To the end that we may have freedom, the bill casts the strength of American industry into the struggle against forces which may be directed against us."[10]

3. *Administration of the statute.*—Until the Office of Lend-Lease Administration (later merged into the Foreign Economic Administra-

[9] H. Rep. No. 18, 77th Cong., 1st Sess., pp. 2, 11.
[10] S. Rep. No. 45, 77th Cong., 1st Sess., p. 2.

tion) was established on October 28, 1941 (Exec. Order No. 8926, 6 F. R. 5519), the President was assisted in the administration of the Act by the Division of Defense Aid Reports (Exec. Order No. 8751, 6 F. R. 2301), the functions of which were characterized as "essentially of a military character", and an Army officer was assigned by Presidential Military Order as its Executive Officer. Military Order of May 6, 1941, 3 CFR, Cum. Supp., pp. 1306–1307; 6 F. R. 2301. Consistently with this initial conception, the administration of the Act never strayed from its fundamentally military objectives. From March 11, 1941, to December 7, 1941, the aim was to secure the national defense of the United States; and, after December 7, 1941, the successful prosecution of the war, together with our allies, in both the West and the East.[11]

The First Report under the Lend-Lease Act, June 10, 1941 (S. Doc. No. 66, 77th Cong., 1st Sess.), commences by stating that the main object of the Act is "to promote the defense of the

[11] Congress quickly attested to the vital importance of lend-lease exports by extending the President's priority power to lend-lease contracts and orders. Act of May 31, 1941, 55 Stat. 236. These orders were bracketed in essentially with Army and Navy contracts. See 87 Cong. Rec. 3800, 3803, 4150. In the debates on the property requisitioning bill, Act of October 16, 1941, 55 Stat. 742, it was pointed out that lend-lease materials would be subject to requisitioning "because the Lend-Lease Act is part of our national defense." 87 Cong. Rec. 6786.

United States by supplying material aid to those nations whose defense is vital to our defense" (p. 1). In his letter of September 11, 1941, transmitting the Second Report (S. Doc. No. 112, 77th Cong., 1st Sess.), President Roosevelt said: "We are not furnishing this aid as an act of charity or sympathy, but as a means of defending America", and "The lend-lease program is no mere side issue to our program of arming for defense. It is an integral part, a keystone, in our great national effort to preserve our national security for generations to come, by crushing the disturbers of our peace" (p. vi). In describing the screening procedure for Lend-Lease requests, the report says: "All items not essential to the successful prosecution of the war effort are eliminated. The governments receiving lend-lease aid have been scrupulous to limit their requests to vital needs" (p. 4).[12] The same themes run throughout each of the twenty-two reports which have been issued.[13]

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[12] The British Government's memorandum of September 10, 1941, transmitted to our Ambassador, categorically stated that "All materials which we obtain under the Lend-Lease Act are required for the prosecution of the war effort." See Appendix I to Second Report, p. 29.

[13] See, for instance, Third Report, December 12, 1941 (S. Doc. No. 149, 77th Cong., 1st Sess.), pp. 29–30; Fourth Report, March 11, 1942 (H. Doc. No. 661, 77th Cong., 2d Sess.), pp. 5, 6, 32; Fifth Report, June 11, 1942 (H. Doc. No. 799, 77th Cong., 2d Sess.), pp. 5, 12; Sixth Report, September 11, 1942 (H. Doc. No. 839, 77th Cong., 2d Sess.), pp. 5, 12, 14; Seventh Report, December 11, 1942 (H. Doc. No. 994, 77th

"*Military considerations* constitute the paramount and determining factor in the provision of all lend-lease aid" (Eighteenth Report, p. 8; Nineteenth Report, p. 40; italics added). "Everything that has been done under the Lend-Lease Act has been for the defense of the United States and for no other purpose" (Sixteenth Report, p. 7). "Lend-Lease and reverse lend-lease are a system of combined war supply" (Seventeenth Report, p. 8).

Far better than any catalog that we could present, the pages of the twenty-two reports to Con-

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Cong., 2d Sess.), pp. 5, 15; Eighth Report, January 25, 1943 (H. Doc. No. 57, 78th Cong., 1st Sess.), pp. 7, 8, 9; Ninth Report (Eighth Quarterly Report), March 11, 1943 (H. Doc. No. 129, 78th Cong., 1st Sess.), pp. 17–18; Tenth Report, May 25, 1943 (H. Doc. No. 209, 78th Cong., 1st Sess.), pp. 6–7; Eleventh Report, August 25, 1943 (H. Doc. No. 263, 78th Cong., 1st Sess.), pp. 6, 7; Twelfth Report, November 11, 1943 (H. Doc. No. 353, 78th Cong., 1st Sess.), p. 1 *et seq.* (reverse lend-lease); Thirteenth Report, January 6, 1944 (H. Doc. No. 375, 78th Cong., 2d Sess.), pp. 5, 7; Fourteenth Report, March 11, 1944 (H. Doc. No. 497, 78th Cong., 2d Sess.), pp. 13–14; Fifteenth Report, May 22, 1944 (H. Doc. No. 616, 78th Cong., 2d Sess.), pp. 5, 6, 10; Sixteenth Report, August 23, 1944 (H. Doc. No. 674, 78th Cong., 2d Sess.), pp. 5–7; Seventeenth Report, November 24, 1944 (H. Doc. No. 764, 78th Cong., 2d Sess.), (reverse lend-lease), p. 7 *et seq.*; Eighteenth Report, February 20, 1945 (H. Doc. No. 98, 79th Cong., 1st Sess.), pp. 7, 8–9; Nineteenth Report, May 22, 1945 (H. Doc. No. 189, 79th Cong., 1st Sess.), pp. 5, 7, 40, 46–47; Twentieth Report, August 30, 1945 (H. Doc. No. 279, 79th Cong., 1st Sess.), pp. 5, 7–9; Twenty-First Report, January 31, 1946 (H. Doc. No. 432, 79th Cong., 2d Sess.), pp. 5, 7, 11; Twenty-Second Report, June 14, 1946 (H. Doc. No. 663, 79th Cong., 2d Sess.), pp. 8–9.

gress underscore, with a wealth of detail and example, these abiding principles of lend-lease supply. By the end of the war, some forty-nine billion dollars in goods and services had been transferred under the Act; actual munitions accounted for 46.9%, petroleum products 5.2%, industrial items (machine tools, iron and steel, etc.) 22.2%, agricultural items (including food) 12.8%, and services and miscellaneous costs, 12.9%; reverse lend-lease brought to our forces over seven billions of goods, facilities and services. Twenty-Second Report, pp. 17–26. As respondents admit (No. 56, R. 15; No. 57, R. 17), no allocation of these many and varied war supplies was made to our allies without careful consideration by American missions in the field, and review by central war agencies, including the War and Navy Departments, Foreign Economic Administration, War Food Administration, War Production Board and the War Shipping Administration, to assure both that our domestic needs had been properly weighed and that the supplies were essential to satisfy genuine war needs.[14] Second Report, p. 7 *et seq.*; Ninth Report, pp. 18–21; Nineteenth Report, p. 40; Stettinius, *Lend-Lease, Weapon for Victory*, pp. 159–163. Those charged

[14] For instance, lend-lease exports to Latin America were confined to munitions and supplies for use by armed forces. Fifteenth Report, p. 30; Eighteenth Report, p. 22; Nineteenth Report, pp. 46–47. All cigarettes exported under lend-lease went to allied armed forces. Eighteenth Report, p. 14.

with responsibility for expending the gigantic lend-lease appropriations (Twenty-Second Report, p. 27) were alert to prevent use of lend-lease supplies for non-war ends. See Nineteenth Report, pp. 40–47.

The essentially military character of lend-lease, as a "system of combined war supply", is further illustrated by reverse lend-lease, or mutual aid. Through that mechanism, war supplies could be produced and delivered by the nation best equipped, at the moment, to do so; and the resources of the United Nations were pooled for placement where they could best be used to wage war. Twelfth Report; Seventeenth Report; Stettinius, *supra,* Chap. XXV. The freight space of hundreds of ships was saved for essential American supplies by the provision of clothing, food, gasoline, and shelter by the United Kingdom to American armed forces; the invasion of the continent was made possible by the synthetic harbors invented and built by the British for unloading supplies on the beaches of France; the *Queen Mary* and the *Queen Elizabeth* transported thousands of American troops to the war theaters. The military importance, in the most stringent sense of that term, of reverse lend-lease is emphasized by President Roosevelt's official statement that "Without the reverse lend-lease aid that we received from the United Kingdom, we would surely have been forced to delay the in-

vasion of France for many months." Letter of November 24, 1944, transmitting the Seventeenth Report. It cannot be forgotten that the lend-lease mechanism directly enabled us to obtain these immense benefits for our armed forces. Not only did lend-lease provide a system of combined war supply, it also served to keep in operation the allied war production machine which supplied our troops. To that end, phosphates as well as airplanes, machine tools as well as tanks, flowed in continuous stream to Great Britain and our other allies.

Since lend-lease and reverse lend-lease were consistently viewed as a system of combined war supply, it was always understood that they should end with the war. Seventeenth Report, p. 8. They did in fact end with the cessation of hostilities, subject to military needs for the movement of troops or for occupation purposes. See President Truman's letter of August 30, 1945, transmitting Twentieth Report, p. 5. "The surrender of Japan signaled the termination of lend-lease as a weapon for victory and prompt steps were taken by this Government to insure a rapid but orderly reduction of lend-lease expenditures and to bring to a close the employment of lend-lease procedures in supplying essential war needs to our allies." President's letter of January 31, 1946, transmitting Twenty-First Report. The military goal had been won, and the implements

which had been essential to the attainment of that victory were no longer needed.

### B. LEND-LEASE SHIPMENTS DID NOT MOVE FOR "CIVIL" PURPOSES

Respondents argue that Congress and the administrators of the Act have clearly distinguished between "civilian" and "military" aspects of lend-lease, and that such a distinction is decisive in resolving the land-grant issue raised here. They seek support, on the one side, in the conceded intention of Congress to include within the category of "defense article" the vast armory of articles and commodities of all types and description required for the prosecution of total war, and, on the other, in the frequent appearance in the lend-lease reports of terms such as "military supplies", "non-military items", and "civilian supplies."

1. *Scope of lend-lease supplies.*—As for respondent's first point, we wholly agree, of course, that Section 2 of the Lend-Lease Act was designed to authorize any article or material useful for war purposes to be transferred to our allies. Out of an abundance of legislative caution, Section 2 (a) (4) was expressly amended to insert the words "any agricultural, industrial", into the original phrase, "any other commodity or article for defense", 87 Cong. Rec. 2050-2, 2167. We agree that supplies of all kinds were continuously transferred under the Act, and properly so. But it does not follow that an "agricultural

or industrial commodity for defense" which has become a "defense article", and is to be shipped "in the interest of national defense" to a country "whose defense the President deems vital to the defense of the United States" is therefore moving for a "civil use," within the meaning of the Transportation Act.

The dominant aim of Congress in enacting Section 321 (a) was to continue land-grant rates for Government property moving for military, including national defense, purposes. Property can move for a military use even though the goods in question—like bowling alleys—would not, in ordinary parlance, be lumped with guns, tanks, or other implements of war which more clearly fall within the category of "military" property. Congress did not restrict the coverage of Section 321 (a) to munitions, weapons, and arms. Instead Congress used the broad elastic term "military property"; and there is nothing to indicate that Congress desired to exclude any commodity, be it industrial, agricultural, or munition, from the reduced charge, so long as the movement was for a military or naval purpose. Property moving for such a purpose must be regarded as "military or naval" property. The fact that a certain commodity is ordinarily regarded as "military type" property or "civil type" property cannot be controlling of the issue here. Parachute silk may be used for making ladies' lingerie; and cold cream may be used for treating fliers' burns.

2. *Characterizations contained in the lend-lease reports.*—The excerpts from the lend-lease reports cited by responderts and the court below prove two things:—first, aid and supplies were shipped for use or consumption by civilians where necessary in aid of actual military operations, or to sustain the essential productive system of an ally fighting for its life, or for the subsistence of American and allied armed forces overseas; and secondly, the reports have, for purposes of exposition and statistics, generally distinguished between actual weapons, arms, and munitions—which are given the short-hand label "military" goods—and other supplies to be used or consumed by soldiers or civilians—which are conveniently described as "non-military," "industrial" or "civilian" goods.

(a) Respondents' main error, in reading the lend-lease reports, is their failure to note that the agencies administering lend-lease have been entirely flexible in using terms such as "military items," "military goods," "non-military items," or "industrial materials and products," in the senses most convenient for their own current accounting and statistical purposes, and without any intention of affecting the application of the Transportation Act of 1940 or any other statute. As we shall have occasion to point out later (pp. 79–82), the words "military" and "non-military" have widely variable content, and their meaning in one context has no definitive bearing

upon a use for another purpose and in a different context, sometimes even within the same document. The lend-lease reports themselves contain abundant examples of this fact, and often quite properly use the adjective "military" in several senses in one report.

As for characterization of supplies, the earlier reports generally apply "military" only to the limited field of munitions, weapons, arms, and implements of war, but even the content of this category is fluid. For instance, the Fourth Report (p. 19) (cited by the Circuit Court of Appeals, No. 56, R. 32) lists the following under the heading "military": "Airplanes, airplane parts, tanks, ordnance, ammunition, field communications equipment, trucks, and petroleum * * * small ships, naval aircraft and ordnance * * * many varieties of ship and airplane stores and equipment." The Seventh Report (p. 8) lists "petroleum products" as an "industrial item", and "military items" include items such as "planes, tanks, ships, guns and ammunition"; at page 16, "military items" include "ordnance, ammunition, aircraft, tanks, motor vehicles, and spare parts, but do not include merchant and naval vessels." In the Eighth Report (p. 21), "military items" cover "aircraft of all types, together with spare engines, propellers, and other parts; tanks, tank destroyers, trucks, jeeps; auxiliary naval vessels and naval equipment; supply ships; ordnance stores such as

ammunition and trucks of all types, small arms, anti-aircraft and anti-tank guns, naval guns and other artillery, mines and torpedoes, etc.; medical, signal, chemical warfare and miscellaneous equipment."[15] The Eleventh Report (p. 8 and chart 3, p. 13) clearly equates "military articles" with "munitions," and the later reports usually employ the term "munitions" as the first of the large categories referred to by the Circuit Court of Appeals[16] (No. 56, R. 32). To equate "military items" with "munitions" is entirely permissible for purposes of lend-lease statistics, but it is wholly inadequate as a basis for determining the scope of Section 321 (a) of the Transportation Act. See *infra,* pp. 88–91.

Moreover, the so-called "non-military" classes of the reports unquestionably include supplies which the lower courts, and probably even the respondents, would regard as "military or naval property moving for military or naval and not for civil use." Under "Industrial Materials and Products", the Eighteenth Report (p. 12) covers

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[15] All these reports list "naval" arms and munitions under the heading of "military items", but we are certain that respondents would not hold "military property" as used in Section 321 (a), to include these naval supplies, thus leaving "naval property" superfluous.

[16] See Thirteenth Report, chart 4 (p. 14), table 12 (p. 56); Fourteenth Report, chart 2 (p. 9), tables 15 and 18 (pp. 54, 57); Fifteenth Report, pp. 8–9, 44–45, 49; Sixteenth Report, pp. 10–11; Eighteenth Report, pp. 8, 10, 40, 45; Nineteenth Report, pp. 8–9, Chap. 3; Twentieth Report, pp. 10, 11; Twenty-First Report, pp. 11, 37.

signal, quartermaster, chemical warfare, engineer, and medical equipment and supplies, as well as equipment, materials and supplies for naval and military bases; the same classification is made by the Nineteenth (pp. 8–9, 25), the Twentieth (p. 10), and the Twenty-First (p. 11) Reports. Petroleum products (including those directly intended for American and allied planes, tanks, and war vehicles) are sometimes included under "nonmilitary goods" (Third Report, p. 11; Fourth Report, p. 14), sometimes under "industrial materials" or "industrial materials and products." (Sixth Report, p. 7; Seventh Report, p. 8; Eighth Report, pp. 22, 30; Tenth Report, p. 12; and Eleventh through Eighteenth Reports; see especially Thirteenth Report, Chap. 7, "Lend-Lease Petroleum in the War" and Eighteenth Report, p. 10), and sometimes under an individual heading (Nineteenth Report, pp. 8, 9, 54; Twentieth Report, p. 10; Twenty-First Report, p. 11; Twenty-Second Report, p. 24). Food and tobacco for British, Soviet, and Chinese soldiers are consistently included under "agricultural commodities" or "nonmilitary goods" rather than "military items" or "munitions." Substances used to extinguish incendiary bombs, chemicals for the manufacture of shells, wood for propellers, medical supplies for soldiers, textiles and leather for soldiers' uniforms—all are termed "industrial" rather than "military". Fourth Report, p. 21. Alloys, tools, and metals directly essential to the production of arms and ammunition are likewise

placed in the "industrial category." See Eighteenth Report, pp. 12–13.

Obviously, therefore, the classifications made by the lend-lease reports are variable and rough labels designed simply to facilitate understanding, by the public and the lend-lease authorities themselves, of the quantities and types of lend-lease shipments. These characterizations were drawn, without undue refinement, from that given by the procuring agency,[17] or the appropriation charged for the supply,[18] or from some conven-

[17] We are informed, for instance, that in the early reports all goods procured by agencies other than the War and Navy Departments, including such combat-useful items as gasoline, were lumped together as "nonmilitary."

[18] The six specific lend-lease appropriation acts (Defense Aid Supplemental Appropriation Act, 1941, 55 Stat. 53; Defense Aid Supplemental Appropriation Act, 1942, 55 Stat. 745; Second Defense Aid Supplemental Appropriation Act, 1942, 56 Stat. 130; Defense Aid Supplemental Appropriation Act, 1943, 57 Stat. 151; Defense Aid Appropriation Act, 1945, 58 Stat. 628; Defense Aid Appropriation Act, 1946, c. 271, 59 Stat. 412, approved July 5, 1945) made appropriations under the following general headings.

Ordnance and ordnance stores
Aircraft and aeronautical material
Tanks, armored cars, etc.
Vessels, ships boats, and other watercraft
Miscellaneous military equipment, supplies, and material
Facilities and equipment
Agriculture, industrial, and other commodities
Testing, reconditioning, etc. of defense articles
Services and expenses
Administrative expenses

The military, naval, and Maritime Commission appropriations acts authorized the respective agencies to use their

tional "inherent character". It was hardly contemplated by the authors of these reports that the construction of any statute or rule of law would depend upon the label that happened to be given, at a particular moment, to a certain item. Respondents draw legal conclusions wholly unwarranted from the very natural segregation of civilian *type* articles from military *type* articles. On this classification of a peacetime usage they seek to engraft a nonexistent military determination. For the pur-

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appropriations for lend-lease procurement, in general terms, without specifying appropriation headings (e. g. Military Appropriation Act, 1943, Sec. 13, 56 Stat. 611, 632); for statistical purposes, the Treasury Department (Bureau of Accounts) maintained all lend-lease accounts under the above ten appropriation headings.

These appropriation headings were broad and semi-arbitrary classes, cutting across procurement agencies and ultimate purposes of the product, and mainly useful for statistical and accounting work. The War Department, for instance, had been allocated, by June 30, 1946, over $400,000,000 under the heading "Agricultural, Industrial and Other Commodities and Articles", and over $750,000,000 under the heading of "Facilities and Equipment for Production"; by June 30, 1946, the Treasury Department had been allocated over $250,000,000 under the heading of "Miscellaneous Military Equipment, Supplies, and Materials", over $150,000,000 under the heading of "Tanks and Other Vehicles", and over $5,000,000 under "Aircraft and Aeronautical Material". As for products procured under the category of "Agricultural, Industrial and Other Commodities", for example, were listed all food products, fire fighting equipment, supplies, and materials, railroad equipment, all petroleum products, iron and steel and other metals, etc. See Treasury Department (Bureau of Accounts), Cumulative Report on Lend-Lease Fiscal Operations, through June 30, 1946.

poses of those keeping lend-lease statistics and writing its reports, it was immaterial what category-names were chosen, or what articles were cast into this class or that, since the Lend-Lease Act applied equally and identically to all "defense articles". To transfer this system of statistical classification, with its entirely unrelated character and purpose, to Section 321 (a) of the Transportation Act, seems to us only to compound confusion.

(b) From the admitted fact that a substantial portion of lend-lease aid was destined for use or ultimate consumption by civilians, respondents infer that these supplies cannot have moved for "military" or "naval" use. But this is to disregard the essentially military character of the lend-lease program. "Military considerations constitute the paramount and determining factor in the provision of all lend-lease aid" (Eighteenth Report, p. 8; Nineteenth Report, p. 40). The constant target was the defeat of the Axis. Each shipment of lend-lease supplies was intended to bring that day closer. The particular means by which each shipment could help in the attainment of final victory was dictated by the fluctuating demands of the war. Foodstuffs, lend-leased for civilian consumption, frustrated the Axis plan of causing the collapse of our allies through starvation, sustained the allied war production system, and made possible the continued production of munitions, arms, and other war supplies. Ninth Report, Chap. 4; Eleventh Report, Chap. 3. Agri-

cultural implements, seeds, and fertilizers enabled some of the United Nations to increase their food production for our troops (including American civilians attached to the military), as well as for their own armed forces and civilians engaged in war production. Fourteenth Report, p. 47; Thirteenth Report, Chap. 8: "Lend-Lease and Farm Machinery". Manufacture of planes and other munitions could not long have continued without machine tools, metals, and essential raw materials. Twenty-First Report, p. 15. Lend-lease merchant ships transported war supplies as well as allied armies.

Supplies for civilians in newly liberated areas were likewise intended to rehabilitate the industrial economy for war production and supply, or to prevent disease or unrest which would interfere with current operations. "From the first, civilian supplies were imported as an integral part of our military program". Stettinius, *Lend-Lease, Weapon for Victory,* pp. 302–303 (detailing the four main military objectives of these supplies). "The United Nations will help the victims of war in liberated territories, not only out of common humanity, but for the most urgent political and military reasons." Seventh Report, p. 25. "Lend-lease is also helping to strengthen the civilian front behind the lines where famine or pestilence might seriously jeopardize our chances of success on the actual fighting lines."

Ninth Report, p. 26. "It is vitally important for the winning of the war that we be prepared to move in rapidly with food in the wake of any military developments that open these areas to the United Nations. Our troops cannot take the offensive successfully in the midst of famine and pestilence, riots and revolution." Eighth Report, p. 46. "In the coming battles for Germany and Japan, we shall need the full support and the full resources of the peoples of the newly liberated areas. This is a military and political necessity of the first order. Their fields can produce food not only for their own people, but for the United Nations' forces. Their factories and mines can supply not only themselves, but our armies as well." President's letter of May 25, 1943, transmitting Tenth Report, p. 5; see also Tenth Report, pp. 16–17. "In addition to arms, we have provided to French Africa vital civilian supplies under lend-lease, at the request of our military commanders. This aid has been essential to United Nations operations in the Mediterranean theater." Thirteenth Report, p. 25. After the capitulation of Germany, lend-lease to our liberated allies was justified by the needs of occupation and of redeployment to the Pacific Theater. "These countries [i. e., France, Belgium, Netherlands] have continued to be important bases of allied military activities in Europe. Their ports and transportation facilities, severely

damaged as the result of enemy action and the bombings and offensives of the liberating allied forces, their production facilities and the services of thousands of their civilians are indispensable for the redeployment of millions of American and other allied forces and their equipment and to the support of our forces of occupation. Lend-lease aid to these countries has helped to increase the effectiveness of their assistance in our military tasks of redeployment and occupation." Twentieth Report, p. 33.

Congress has expressly recognized, in legislation enacted since the Lend-Lease Act, that supplying civilians with subsistence can have prime military significance. Both the Military Appropriation Act, 1945, 58 Stat. 573, 593, and the Military Appropriation Act, 1946, c. 265, 59 Stat. 384, provide that appropriations for the military establishment for the respective fiscal years shall be available "for food, clothing, medicine and other items to meet urgent civilian needs in occupied and such other areas as may be determined by the Secretary of War to be important to military operations of the United States." Cf. Military Appropriation Act, 1947, Public No. 515, 79th Cong., 2d Sess., "Government and Relief in Occupied Areas." For justification of the military need for such supplies, see Hearings before a Subcommittee of the House Committee on Appropriations, 78th Cong., 2d Sess., on the

Military Establishment Appropriation Bill for 1945, pp. 13, 37–38, 154–164 (statements of Lt. General McNarney, Major Generals Richards, Hilldring and Clay).

In short, modern warfare results in what superficially seems a paradox: that "civilian" supplies may be used primarily to fulfill military purposes. And we think it beyond controversy that such was the dominant purpose of the transfer of "civilian supplies" under the Lend-Lease Act to our allies and to the liberated areas.[19]

C. THE PARTICULAR SHIPMENTS HERE INVOLVED WERE MILITARY PROPERTY MOVING FOR MILITARY USE

The Government urges that all lend-lease "defense articles" are entitled to land-grant rates. In our view, examination of the nature and purposes of each shipment is both unnecessary and inappropriate. Unless the authority to make the transfer under the Lend-Lease Act is successfully challenged, there exists in each case a proper executive finding that the shipment will promote

[19] Respondents have not denied that the lend-lease shipments involved here constituted property of the United States. It is perhaps noteworthy that possession and control over lend-lease shipments always remained in the United States, or its agents, until transfer to the possession and control of the receiving country took place at ship-side. Title clearly remained in the United States during the period of its possession and control, and was not considered to pass even after transfer, at the ship, to the allied nation.

our national defense. The courts should not be required to reexamine the need for a specific shipment, or to balance the circumstances in order to weigh the effect of the transfer, or its withholding, upon the course of the war. Nor would such individual rulings aid materially in the administrative decision of the many rates under Section 321 (a) still in controversy between the railroads and the Government.

Nevertheless, since the cases now before the Court do involve phosphates shipped to Great Britain in 1941, we shall refer to the circumstances which clothed these particular shipments with military significance.

Phosphates are vital, in time of war, as fertilizer in the production of food.[20] Hendrickson; *The Food Crisis*, pp. 154–5. The stoppage of phosphates and fodder has been considered by some as a more important factor in the defeat of Germany in World War I than the cutting off of her overseas food supply. See Garner, *Proposed Immunity of Food Ships in Time of War*, (1930) 24 Am. J. Int. Law 566, 568; statement of Congressman Leavy, 83 Cong. Rec. 9342 (1938). This was early recognized in the first world war, and phosphorus and its compounds were desig-

[20] It may be noted that phosphates are also a key ingredient in the production of many types of munitions, including tracer bullets and flares, grenades and bombs. Johnson, *Economic Factors in the U. S. Phosphate Industry* (1944), 25 Mining and Metallurgy 455, at 464.

nated "absolute contraband" by Great Britain on January 27, 1916. Rackham, *List of Contraband,* 3rd ed.

The great importance of food to a people at war, civilians as well as soldiers, has not been seriously questioned for over thirty years. "During the World War the battleship was a factor, but the cutting off of the food supply by vessels of less tonnage was a main objective. There was also a question as to what constituted food, and the list of contraband was enlarged to an extent heretofore unknown, so that almost every commodity might be included. States mobilized their entire populations. It was difficult to determine whether women working in munition factories behind the lines were more essential or the men at the front." Wilson, *Food Supplies and Belligerents,* (1930) 24 Am. J. Int. Law 365; see also Garner, *supra* at p. 567. "Food is a weapon of war. In its way it is as essential to winning the war as planes or guns. Germany's unrestricted submarine campaign in the war of 1914–18 was primarily an attempt to knock out England by cutting off her food supply. And food shortages in Germany and Austria resulting from the successful British blockade played a large part in the Allied victory then." Eighth Lend-Lease Report, p. 42. It is not only that food sustains the producers of munitions and other war supplies essential to the continuance of the war effort, or

that starvation at home may cause the collapse of a nation not defeated on the fighting front. The army's food supply program is even more directly concerned with civilian supplies. When a belligerent is on the verge of food exhaustion, any increase in its supply inures to the benefit of the armed forces, dependent as they are on the total volume of national food resources. If a nation lacks sufficient food, its army must inevitably suffer. For these reasons, in the first war, the British courts and government insisted that shipments of food, intended for civilian consumption, be considered contraband. *The Hakan* (1918) A. C. 148, 151;[21] *The Kim* (1915) Prob. Div. 215, 281. The American contraband list of 1917 also included "all kinds of fuel, food, food-

[21] In *The Hakan*, the Judicial Committee of the Privy Council said:

"* * * * It may be quite true that their ultimate application * * * would have been to feed civilians, and not the naval or military forces of Germany; but the general scarcity of food in Germany has made the victualling of the civil population a war problem. Even if the military or naval forces of Germany are never supplied with salted herrings, their rations of bread or meat may well be increased by reason of the possibility of supplying salted herrings to the civil population. Under these circumstances, the inference is almost irresistible that the goods were intended to be applied for warlike purposes * * *."

See Pyke, *The Law of Contraband of War*, p. 98:

"Foods may be imported for the use of civilians, but it is quite certain that if the army wants them it will take them."

stuffs, feed, forage." 7 Hackworth, *Digest of International Law*, p. 23.

In World War II, no one has questioned the general place of food in war supplies. The Lend-Lease Act expressly included among "defense articles" "* * * the usual implements of war, such as guns, airplanes, and tanks, and also the food, clothing, medical supplies, and the like, without which warring nations would be helpless." S. Rep. No. 45 (to accompany H. R. 1776), 77th Cong., 1st Sess., p. 2. Phosphates, fertilizers, and foodstuffs were included in the lists of items covered by the Export Control Act of July 2, 1940, sec. 6, 54 Stat. 712, which applies to "any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof." See 6 F. R. 1300, 1301, 1540, 3591. As the Committee on Appropriations of the House of Representatives had occasion to say, in reporting the first wartime Department of Agriculture Appropriation bill to the 77th Congress in March 1942: "Food, derived almost entirely from agricultural products, is one of those resources. It is rated as a war material of importance equal to that of munitions, ships, airplanes, and fuel oil. Upon the ability of American agriculture to produce food of the right kind, and in sufficient quantities for our Allies as well as for ourselves, the outcome of the present world conflict will in great part

depend." H. Rep. No. 1848, 77th Congress, 2d Sess., pp. 1–2.

The desperateness of Britain's food situation in 1941 is now common knowledge. Normally a country importing 63% of her foodstuffs, she found her ordinary continental resources of supply cut off by the German offensive of 1940, and her overseas importations drastically reduced by submarine warfare. In addition, the ever-decreasing shipping space available to her had perforce to be stocked with munitions and raw materials for domestic munitions production, and precious foreign exchange was likewise primarily spent on these arms and materials. In the spring of 1941, there was only a few weeks' reserve supply of food left in the United Kingdom, and the Axis had almost succeeded in starving Great Britain into utter defeat. It was at this time that the first lend-lease shipments of food arrived from the United States, and successive shipments in 1941 "tided Britain over her most serious food crisis of the war." Stettinius, *Lend-Lease, Weapon for Victory*, pp. 96–98; Third Report, chap. 5, "The Food Front". These shipments were necessary to sustain the soldiers and sailors of the British Army and Navy, the fliers of the R. A. F., the war workers, the air-raid wardens and the other fighting men and women of Britain—all of whom constituted, in 1941, our first line of military defense against Germany. But food from the

United States was not enough. It was equally necessary for Great Britain to decrease her reliance on sea-borne supplies and to increase domestic production in order to meet her food needs. Ships had to be reserved for implements of war and articles unobtainable in the United Kingdom; submarine packs constantly threatened to interrupt the flow of subsistence; American food supplies were far from sufficient for all needs. As the parties have stipulated (No. 56, R. 15; No. 57, R. 18), "it was necessary to put into production a large acreage of land not normally used for the production of food for direct human consumption, and phosphate fertilizers had to be imported and distributed to effectuate this revised agricultural program. * * * In 1941, the United States was the only practical source [North Africa, the normal source of phosphates, was still in German hands] from which Great Britain could acquire such materials." It was in fulfillment of this program of intensified food production that President Roosevelt personally signed the directive under which these phosphates moved to Great Britain, and the later shipments followed (No. 57, R. 10–11).

Great Britain used these life-saving imports of fertilizer so well, along with the other factors in its intensified program,[22] that by the end of

[22] These other factors included (a) increased use of lend-lease farm machinery; (b) "plowing up and planting grasslands, parks, lawns, golf courses and other areas" (Eleventh

1942 it was raising 60% of its total food supply (Eighth Report, p. 42) and by the middle of 1943, the figure was 70% (Eleventh Report, p. 26). "These gains could not have been made, however, without the aid of seeds, fertilizers and farm machinery from the United States. Our superphosphates have made it possible to get good crops from the many acres of marginal land that would otherwise be almost useless." Stettinius, *op. cit., supra,* p. 257; Hendrickson, *The Food Crisis* (1943) pp. 154–5; Twentieth Report, p. 19.[23] The food which was the product of these urgent efforts supplied the British armed forces, the British civil population which was totally mobilized in support of the war, and, ultimately, in part, our own troops, through reverse lend-lease. See Twelfth Report, p. 5, and Nineteenth Report,

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Report, p. 26); (c) forced plantings which in the long run would wear down the fertility of the soils, thus deliberately choosing food over future fertility (Hendrickson, *The Food Crisis* (1943) p. 155; (d) revolutionary change in eating habits from meat to cereal-eating (Stettinius, *Lend-Lease Weapon for Victory*, p. 256).

[23] Lend-lease shipments of agricultural commodities to the Union of Soviet Socialist Republics, and certain other of the United Nations, were equally decisive. The Germans had ravished Russia's great granary, the Ukraine, and shipments of food were needed to maintain the rations of the Soviet Army, which could not be supplied internally, even though civilian consumption was cut to the bone. Tenth Report, p. 21; Fourteenth Report, p. 11; Fifteenth Report, p. 28; Stettinius, *op. cit., supra,* pp. 226–228.

p. 32. Above all, this food helped to keep Great Britain a powerful factor in the coalition waging war to defeat the Axis powers. Even with its help, the United States had to continue to lend-lease 10% of Britain's food requirements, an extremely important percentage which raised Britain's food production to the level of a "minimum efficiency diet" and "constitutes the margin between having enough so that she can fight effectively and not having enough to carry on." Eleventh Report, p. 27; Nineteenth Report, p. 28. Without Britain's increased domestic production of food, either valuable shipping space desperately needed for guns and tanks and planes would have had to have been filled with food from the United States, its food supply already overburdened, or, and there is no mistaking this, Great Britain would not have been able to continue to wage war effectively.

That Great Britain should not be overwhelmed by the Axis was the cardinal point of our defense policy in 1941, and a first principle of our war policy from Pearl Harbor to the collapse of the Axis nations. These phosphate shipments had the direct function of keeping Britain actively in the fight against Germany. That end was military, and the use of the phosphates to achieve that goal, even if initially through civilian farmers, was decidedly a military and not a civil use.

## II

## THE HISTORY AND BACKGROUND OF THE TRANSPORTATION ACT OF 1940, AS WELL AS ITS LANGUAGE, SUPPORT THE VIEW THAT CONGRESS INTENDED TO CONTINUE LAND-GRANT RATES FOR ALL GOVERNMENT PROPERTY MOVING FOR THE MILITARY PURPOSE OF SECURING THE NATIONAL DEFENSE

### A. THE HISTORY AND BACKGROUND OF THE LAND-GRANT PROVISION OF SECTION 321 (A)

1. *Land-grant deductions prior to 1940.*—The Court is familiar with the general history of the grant of public lands to the railroads and their obligation to transport all Government property and troops at reduced rates. See *Southern Pacific Co.* v. *United States*, 285 U. S. 240, 242–4; *Southern Railway Co.* v. *United States*, 322 U. S. 72, 73–74; cf. Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, pp. 3–45; *Note, Land Grant Railroad Rates* (1940), 8 Geo. Washington L. Rev. 930; Board of Investigation and Research, *Public Aids to Domestic Transportation* (1944), H. Doc. No. 159, 79th Cong., 1st Sess., pp. 55–57, 107 *et seq.* The Seaboard's predecessor, for instance, received a grant of land in Florida with the usual condition that the "said railroads * * * shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops

of the United States." Act of May 17, 1856, c. 31, 11 Stat. 15, 16. An extended controversy over the extent of the railroads' obligation under a grant of this character was finally determined, in 1877, by this Court's holding that such grants reserved to the Government only the free use of the roadbed and not the free use of the rolling stock. *Lake Superior and Mississippi Railroad Co.* v. *United States,* 93 U. S. 442. Following this decision, the Court of Claims, on suit by railroads for freight charges withheld by the Government, held that a reduction of fifty percent from the ordinary commercial tariffs was a "fair deduction" for the use of their respective railroads. *The Atchison, Topeka and Santa Fe Railroad* v. *United States,* 15 C. Cls. 126, 138, 148 (1879). Thereafter, Congress provided in each Army appropriation act for the payment of land-grant rates at fifty or, in one instance, at sixty percent of the commercial rates, as determined by the "proper accounting officers." In the Army Appropriation Act of July 16, 1892, c. 195, 27 Stat. 174, 180, Congress standardized the land-grant deduction by providing, again in the form of a limitation on an annual Army appropriation, for the payment "for transportation of troops and munitions of war and military supplies and property," of rates deemed by the Secretary of War to be just and reasonable, but not to exceed fifty percent of the rates charged to private parties. Like provisions were adopted in subse-

quent Army appropriation measures [24], until 1924, when the Army Appropriation Act of June 7, 1924, c. 291, 43 Stat. 477, 486, 10 U. S. C. 1375, embodied the previous annual practice in permanent legislation. The 1924 statute was the governing act until the adoption of the Transportation Act of 1940, and continued thereafter to have its full effect in those cases in which the 1940 Act did not relieve the carriers of their land-grant obligations.[25] Additional reductions were secured by the Government through "equalization agreements," under which land-grant rates were accepted by nonland-grant railroads (such as Atlantic Coast line, respondent in No. 57), so that they might be in a position to compete for Government business. See *Southern Railway Co.* v. *United States*, 322 U. S. 72, 73–74; *Northern Pacific Ry. Co.* v. *United States*, 72 C. Cls. 563; Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, p. 42.

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[24] The Government's accounting officers consistently ruled that these restrictions in the Army appropriation acts were "applicable to the transportation of all Government property regardless of the appropriation chargeable therewith," and the railroads acquiesced in these rulings. See 4 Lawrence, Comp. Dec. 127, 3 Comp. Dec. 724, 21 Comp. Dec. 744, 23 Comp. Dec. 395, 397, and manuscript decisions referred to therein. See also *Northern Pacific Ry. Co.* v. *United States*, 72 C. Cls. 563, 574.

[25] Effective October 1, 1946, the Act of June 7, 1924, is prospectively repealed, in its entirety, by the Act of December 12, 1945, 59 Stat. 606, Appendix, *infra*, pp. 115–116, which abolishes all land-grant deductions.

When these grants were originally made, there was but little transportable Government property other than military, and the expectation clearly was that almost all of the goods transported over the land-grant roads would be supplies for the military establishment, over which the War and Navy Departments would have control.[26] And at least until the third decade of this century, the major portion of the Government property carried at reduced rates was directly connected with the national defense. See Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol. II, pp. 41–43; Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., on H. R. 10620, statement of Commissioner East-

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[26] The promotion of the national defense, through the establishment of adequate railroads, was one major purpose for the making of land grants. Cf. the statement of Senator Seward in the course of a debate on grants in Illinois, Mississippi, and Alabama:

"I trust that the day is far distant when we shall have occasion for any road for the purpose of military defence; but we can all see that the time may come, and we know not how soon it may be, when this and all of our public roads may be required for military purposes. And if it be right in time of peace to prepare for war, then it is right to make these appropriations, which are, after all, most effective securities for peace by preventing war, and are most indispensable works of defence in case of actual war."

22 Cong. Globe, reprinted in Federal Coordinator of Transportation, *Public Aids to Transportation* (1938), Vol II, p. 26.

man, at pp. 6–7, and report of the War Department at p. 16. Congress recognized this basic fact by regularly including its directions concerning land-grant rates in Army appropriation measures, and designating the Secretary of War to determine the just and reasonable amount to be paid for the carriage of all Government property over aided railroads.

2. *Legislative history of the Transportation Act of 1940.*—The depression decade of the 1930's saw the railroads in their most difficult financial crisis. This gave rise to insistent demands that the Government relinquish its land-grant reductions. The two special committees appointed by the President to survey the general condition of the railroads—first, the Committee of Three and, thereafter, the Committee of Six—both recommended the complete abolition of the Governmental deduction (Committee of Three: Report of March 24, 1938, H. Doc. No. 583, 75th Cong., 3d Sess.; Committee of Six: Report of December 23, 1938, printed in Hearings before the House Committee on Interstate and Foreign Commerce, on H. R. 2531, 76th Cong., 1st Sess., Vol. II, pp. 260, 271–272). The Interstate Commerce Commission and Commissioner Eastman (who had been Federal Coordinator of Transportation) concurred. The railroads, of course, enthusiastically favored the proposal. The main reason urged to

support the fairness of this proposal for partially alleviating the carriers' financial straits was the increase, in recent years, of the transportation of Government property. As the Committee of Six said: "There are now 69 different agencies and departments of Government which receive the benefit of these reduced rates, and the number is constantly increasing. This traffic has grown to a volume far in excess of anything that could possibly have been in contemplation of the parties at the time the land grants were made."

Early in 1938, in order to effectuate the recommendation of the Committee of Three, there was introduced into the 75th Congress H. R. 10620, a simple measure to remove all existing land-grant reductions. At about the same time, Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, introduced a similar bill at the request of the Committee of Three (83 Cong. Rec. 7054), S. 3876. No public hearings appear to have been held by the Senate Committee on Interstate Commerce, but it unanimously recommended an amendment that "such applicable commercial rate shall not be paid for the transportation of men, officers, or personnel in any branch of the military or naval service and military or naval property" (S. Rep. No. 1791, 75th Cong., 3d Sess.). The introduction of this exception was described by R. V. Fletcher, General Counsel of the Association of American Railroads, in his con-

temporaneous testimony on the House bill, H. R. 10620, before the House Committee on Interstate and Foreign Commerce:

> * * * we have never been able to understand why there should be, certainly at least in times of peace, any provisions that the commercial rates should not be paid for the transportation of men, officers, and personnel in the military or naval service, and military and naval property. * * * there was a conference in Senator Wheeler's office * * * and this land-grant matter, which was in the agenda, came up for discussion. Senator Wheeler asked if the railroads would object to having a clause put in the bill which would permit the application of these reduced rates in time of war, and we said that we would not object to a clause of that kind, and I thought that was the understanding; but when the bill came out of the committee it had this broad provision, which excepted military property, and the transportation of troops, even in times of peace, which was not what I hoped would be the conclusion of the committee. [Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess., on H. R. 10620, June 1, 1938, p. 32.]

At the request of Senator Wheeler, S. 3876 was recommitted to the Committee on Interstate Commerce, before any action was taken by the Senate,

and the bill died with the 75th Congress (See 83 Cong. Rec. 7054).

The House Committee on Interstate and Foreign Commerce held extensive hearings on H. R. 10620. Representatives of the railroads and railroad unions appeared to urge the total abolition of the reductions, as did Commissioner Joseph B. Eastman. Repeated reference was made to the great increase of Government transportation caused by the relief and emergency activities of the new federal agencies established in the thirties. See Hearings on H. R. 10620, pp. 6–7 (statement of Commissioner Eastman); p. 16 (War Department report); pp. 39–41 (R. V. Fletcher, General Counsel, Association of American Railroads); p. 79 (C. S. Duncan, Economist, Association of American Railroads.)[27] Opposed to repeal of the reductions was the Procurement Division of the Treasury Department, a major Government purchasing agency. The War Department adopted the exception for "military or naval property," which had been inserted in the Senate bill, S. 3876, and strongly suggested a similar proviso to H. R. 10620 (See Hearings on H. R. 10620, *supra*, pp. 16–17). In this connection, it is also

[27] Duncan stated: "I refer here to the fact that these provisions in the land grants, requiring reductions in rates on Government traffic, are made to apply today to all sorts of projects having nothing at all to do with military affairs. They apply on materials for T. V. A., for P. W. A., and W. P. A. projects."

significant, we think, that there was not absent from the House Committee on Interstate and Foreign Affairs, even in the spring of 1938, an appreciation of the possibility of international strife, as the following colloquy between Congressman Pearson and Mr. Eastman shows:

> Mr. PEARSON. * * * It occurs to me that the outlook at the present time is such that it might be a little unfair to the Government to enact this proposal into law and then find ourselves, possibly, in a state of war and the Government called upon to pay for the transportation of troops and supplies at full cost, whereas the railroads are already obligated under their original acceptance of these land grants to transport troops and supplies at reduced rates.
>
> Of course, that might be a farfetched view of it, but I do not think there is any gainsaying the fact that conditions in the world are such that we do not know when a state of war might be declared, and this proposal can carry with it a tremendous expense for the Government at a time when it could least afford to bear that expense.
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> Mr. EASTMAN. That matter was not taken into consideration by the committee which reported to the President. [Hearings on H. R. 10620, pp. 8–9.]

However, the Committee reported H. R. 10620 without including the exception for military and naval property (H. Rep. No. 2694, 75th Cong.), but no action was taken by the 75th Congress.

In the 76th Congress, the effort to abolish the Government's land-grant rate privileges was resumed. In the Senate, two separate bills were introduced to accomplish this purpose: S. 1915 called for complete repeal, and S. 1990 followed S. 3876 of the 75th Congress in retaining the reduction for military property. Hearings on the two measures were held by the Senate Committee on Interstate Commerce, at which railroad representatives repeated their arguments for complete repeal, and the Treasury and Interior Departments opposed.[28] Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1915, S. 1990, and S. 2294, June 5, 1939. Neither of these bills was acted upon by the Committee or by the Senate. In the House of Representatives, instead of the introduction of separate bills, a provision completely cutting off the land-grant reduction was incorporated in H. R. 2531, the omnibus transportation bill which was intended to embody the various current official recommendations for the relief and rehabilitation of the railroads. At the hearings on H. R. 2531, little time was given to the land-grant provision, and the Committee was mainly referred to the testi-

[28] The Interior Department suggested that, if Congress were to repeal the land-grant requirements, the carriers be compelled to return all public lands still in their possession, and the Department of Justice favored a release of all claims not yet settled. It is probable that Section 321 (b) of the Transportation Act of 1940 emerged from proposals such as these.

mony on H. R. 10620 of the 75th Congress (Hearings before the House Committee on Interstate and Foreign Commerce, 76th Cong., 1st Sess., on H. R. 2531, H. R. 188, and H. R. 4862, pp. 57–58, 160, 184–185, 652–654, 1725), but again it is significant that stress was laid upon the then recent increase in the shipment by the Government of "commercial" and "non-military" goods.[29]

The Senate's omnibus transportation bill, S. 2009, which was entirely silent as to land-grant rates,[30] passed that body on May 25, 1939, before the House Committee had completed its action on H. R. 2531. In reporting S. 2009 to the House, the Committee adopted the common device of substituting its own omnibus bill, which contained a section, 321 (a), requiring the payment of full commercial rates by the Government. The Committee's report (H. Rep. No. 1217, 76th Cong., 1st Sess., p. 27, July 18, 1939) merely para-

[29] Mr. Carl R. Gray, Vice-Chairman of the Board of Directors of the Union Pacific Railroad Company, and a member of the Committee of Six, said:

"It [the land-grant obligation] is growing in this way, that no one had any conception or could have had any conception in the sixties and seventies that this Government would be in every class of business that exists in this country, even in the provisions and shipments of food; every kind of material; all of those commercial things that were not in the picture whatever at that time." Hearings, *supra*, at p. 185.

[30] Hearings before the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1310, 2016, 1869, and 2009 (Transportation Act of 1939) contains nothing significant on this matter.

phrases the provision, but the debate in the House plainly indicates that the supporters of total repeal of the land-grant reduction were largely moved by the recent progressive increase in Government shipments by emergency and relief agencies, such as the P. W. A. and W. P. A. It was strongly emphasized that the type of shipments made in the years 1933–1939 differed radically from the military supplies which it was originally contemplated would be carried on behalf of the Government.[31]

[31] Rep. HINSHAW. "Since all of this has taken place, the Government has gone into the freight-moving business more and more. The transport of troops and the transport of materials is a very small matter now, and has been a small matter over many years. Now, the Government of the United States is transporting in the hundreds and thousands of tons every conceivable kind of commercial freight you can imagine—steel, cement, food products, and everything else, for the building of roads, dams, post offices, schools, and so forth—so the Government has put upon these roads a tremendous burden which was not contemplated when the lands were originally granted." (84 Cong. Rec. 10114–10115.)

Rep. WADSWORTH. "May I interpolate that for the last 5 or 6 years Government shipments have increased tremendously. Not only do the normal shipments continue, but every time the Government makes a grant for the building of a schoolhouse or the construction of a new waterworks in some town the raw material for the construction is shipped under a Government tag, and the railroad must carry it at a 50-percent reduction. You all realize what an enormous amount of that has been going on in the last 3 or 4 years, and apparently, unless certain conditions change, there will be no end to it." (84 Cong. Rec. 10117.)

Rep. MARTIN. "The entire picture has changed since the land grants were made over 70 years ago. There is abso-

As passed by the House (on July 26, 1939, before the outbreak of World War II), the omnibus transportation bill retained the provision completely abolishing the Government's reduction. 84 Cong. Rec. 10121, 10127. Because of the press of other matters, and Congressional recesses, as well as the difficulty of the task of resolving the differences between the two Houses, the conference committee did not report until late in April 1940, eight months after the beginning of World War II. The committee agreed upon the provision which now appears in Section 321 (a) of the Transportation Act of 1940, including the exception for "military or naval property of the United States moving for military or naval and not for civil use." There was extended debate in both bodies on the conference's bill, but attention was focused on other matters and there was no discussion of the land-grant section. The confer-

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lutely no comparison between conditions then and now, yet the obligations of the railroads will increase permanently." (84 Cong. Rec. 10117.)

Rep. LEA (in charge of the bill). "At the time those grants were made the traffic for the Government was trivial. The main thing under contemplation was the movement of military men and supplies. * * * In 1937 there were $7,000,000 in freight and almost $3,000,000 in mail advantage to the Government, making a total for the Government of about $10,000,000 a year on account of this concession. That figure for 1937 reflects the greater Government tonnage, due largely to construction activities." (84 Cong. Rec. 10118.).

Rep. CASE. "Today most of the heavy-materials business is public buying. Everybody knows that. There is little private construction." (84 Cong. Rec. 10131.)

ence reports (H. Rep. 2016, 76th Cong., 3d Sess., April 26, 1940, p. 87, and H. Rep. 2832, 76th Cong., 3d Sess., August 7, 1940, p. 93) merely state that the conference substitute changes the House proposal "by making an exception from this requirement of the payment of full commercial rates by the United States, in the case of the transportation of military or naval property moving for military or naval use, and in the case of the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty. In the case of transportation thus excepted, existing legal requirements and arrangements providing for reduced rates will continue to apply."

S. 2009 became the Transportation Act of 1940 on September 18, 1940. By that time, World War II had been waged for over a year; in April 1940, Norway had been invaded by Germany; early in May had come the blitz attacks on France, Belgium, and Holland; in June, Italy had delivered its "stab in the back"; France and the low countries had fallen; in August, daily mass bombings of Britain had begun; and, as we now know, Hitler planned to invade the British Isles on September 21, 1940. As the court below described it, "Sympathies in this country then ran strongly against the Axis powers; it was pretty generally agreed that we should help the enemies of the Axis; there was real fear that the

United States might become involved in the conflict; swift measures for defense had to be perfected on an extremely wide scale" (No. 56, R. 32).

We are not yet too distant to recall that in the summer and fall of 1940, for the first time since 1918, military defense measures were foremost in the Congressional mind. Congress was preoccupied with providing for the defense of the land, and it is only natural that this preoccupation should have contributed to the insertion of the land-grant proviso in Section 321 (a) of the Transportation Act of 1940. The Congress at that time was visibly aware of the possibility of war, and was concerned with making accommodations necessary to enable the Government to convert to a wartime basis, if the threatened war should come. The legislation enacted during this lull before the storm shows that Congress was concerned lest its enactments would put burdens on the Government which might discommode it in prosecuting a war. Only to list the more important national defense acts adopted by the Congress during the period of June 1, 1940 through October 15, 1940, makes this clear.[32] The Transportation Act of 1940 itself

[32] June 11, 1940, 54 Stat. 265, 292, 297—making appropriations for the naval establishment for the fiscal year ending June 30, 1941.

June 13, 1940, 54 Stat. 350, 377—making appropriations for the military establishment for the fiscal year ending June 30, 1941.

June 14, 1940, 54 Stat. 394—An Act to establish the composition of the United States Navy, to authorize the

explicitly provides, in the declaration of national transportation policy, that one aim of the statute

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construction of certain naval vessels, and for other purposes.

June 15, 1940, 54 Stat. 396—Joint Resolution to authorize the Secretaries of War and Navy to assist the governments of American republics to increase their military and naval establishments, and for other purposes.

June 15, 1940, 54 Stat. 400—An Act to authorize the construction or acquisition of naval aircraft, the construction of certain public works, and for other purposes.

June 20, 1940, 54 Stat. 492—An Act providing for the reorganization of the Navy Department, and for other purposes.

June 25, 1940, 54 Stat. 516—Revenue Act of 1940 (5 year defense tax).

June 26, 1940, 54 Stat. 599—First Supplemental National Defense Appropriation Act, 1941.

June 28, 1940, 54 Stat. 670—Alien Registration Act, 1940.

June 28, 1940, 54 Stat. 676—An Act to expedite the national defense, and for other purposes.

July 2, 1940, 54 Stat. 712—An Act to expedite the strengthening of the national defense.

July 19, 1940, 54 Stat. 779—An Act to establish the composition of the United States Navy, to authorize the construction of certain vessels, and for other purposes.

August 27, 1940, 54 Stat. 858—Joint Resolution to strengthen the common defense and to authorize the President to order members and units of reserve components and retired personnel of the Regular Army into active military service.

August 27, 1940, 54 Stat. 864—Naval Aviation Personnel Act of 1940.

September 9, 1940, 54 Stat. 872—Second Supplemental National Defense Appropriation Act, 1941.

September 16, 1940, 54 Stat. 885—Selective Training and Service Act of 1940.

September 16, 1940, 54 Stat. 897—An Act to authorize the Reconstruction Finance Corporation to make loans for the development of deposits of strategic and critical min-

is the establishment of a national transportation system "adequate to meet the needs . . . of the national defense," and that all of the provisions of the Act "shall be administered and enforced with a view to carrying out the above declaration of policy." In the formulation of other relevant general legislation during this period, the national defense was also constantly in mind. The Federal Highways Act of 1940, 54

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erals which in the opinion of the Corporation would be of value to the United States in time of war.

September 18, 1940, 54 Stat. 898—Transportation Act of 1940.

September 24, 1940, 54 Stat. 958—Joint Resolution making additional appropriations for the Military Establishment for the fiscal year ending June 30, 1941.

October 8, 1940, 54 Stat. 965—Third Supplemental National Defense Appropriation Act, 1941.

October 8, 1940, 54 Stat. 974—Second Revenue Act of 1940, including:

Title II—Excess Profits Tax Act of 1940
Title III—Amortization Deduction.
Title IV—Suspension of Profit-Limiting Provisions of the Vinson Act and certain provisions of the Merchant Marine Act, 1936
Title VI—National Service Life Insurance

October 9, 1940, 54 Stat. 1029—Assignment of Claims Act of 1940.

October 10, 1940, 54 Stat. 1090—To authorize the President to requisition certain articles and materials for the use of the United States, and for other purposes.

October 17, 1940, 54 Stat. 1178—Soldiers' and Sailors' Civil Relief Act of 1940.

October 17, 1940, 54 Stat. 1201—To require the registration of certain organizations carrying on activities within the United States, and for other purposes.

Stat. 867, 868, 871–872, provided, for instance, that federal funds made available to states without matching should be expended "in the construction of projects desirable from the standpoint of national defense", and that priority was to be given to national defense projects. Moreover, Congress was particularly concerned not to burden defense activities with normal restrictive requirements. Competitive bidding and other rules of Government contracting were partially suspended by the Act of July 2, 1940, 54 Stat. 712, and contemporary provisions in appropriation acts; the rules as to assignment of claims against the Government were loosened by the Assignment of Claims Act, 54 Stat. 1029; "to expedite national defense", the eight-hour law was suspended for Maritime Commission contracts, Act of October 10, 1940, 54 Stat. 1092. A proviso to a comprehensive statute providing for the safe carriage of explosives (Act of October 9, 1940, 54 Stat. 1023, 1025) ensured that the Act would not "prevent the transportation of military or naval forces with their accompanying munitions of war and stores". The Communications Act of 1934 was amended to permit communication utilities to provide "free service in connection with the preparation for the national defense", Act of June 25, 1940, 54 Stat. 570. The Walter-Logan administrative procedure bill, vetoed by the President, exempted the military and naval establishments from its requirements. See S. Doc. No. 145, 76th Cong., 3rd Sess.

The purposes Congress sought to attain through the land-grant provision of the Transportation Act of 1940 are thus clear. Moved by the enormously increased use of the land-grant privilege for nonmilitary emergency and relief shipments during the years of depression,[33] Congress

[33] That this was the prime factor in Congressional action in 1940 is amply confirmed by many statements in the legislative materials on the various attempts, from 1942 to 1946, to repeal the exception for "military or naval property." For instance, see H. Rep. No. 1910, 77th Cong., on H. R. 6156, p. 4, referring to the enormous increase in certain supplies in the thirties; H. Rep. No. 1408, 78th Cong., on H. R. 4184, p. 3, with similar reference; H. Rep. No. 393, 79th Cong., on H. R. 694, p. 3, and S. Rep. No. 552, 79th Cong., on H. R. 694, p. 4, both stating:

"In the Transportation Act of 1940, because of the enormous increase in recent years, and particularly during the years of depression, in the nonmilitary activities and traffic of the Government, Congress deemed it proper to make the land-grant reductions inapplicable, so far as concerns the transportation of property, to anything except 'military or naval property of the United States moving for military or naval and not for civil use.'"

In the debate on H. R. 694, 79th Congress, which became Public Law No. 256 (Act of December 12, 1945, printed in the Appendix, *infra*, pp. 115–116), Senator Wheeler, Chairman of the Senate Committee on Interstate Commerce, said:

"The Act of 1940 which, as I said a moment ago, the present President of the United States, as a member of the Interstate Commerce Committee, was very much interested in having enacted, amended the prior act so as to except from the land-grant rates the civilian goods which were being shipped for relief purposes, because it was contended by him and by everyone else who gave the subject thought, that it was never intended in the original act that civilian goods should receive the deduction provided by land-grant rates. So the

desired to return to the original purpose of the reduction, which was to insure the easy and cheap transportation of property connected with the national defense. The railroads and shippers, as well as a substantial segment of the Congress, would doubtless have preferred to abolish the Government's deduction completely;[34] but the

law was amended without any debate at the time" (91 Cong. Rec. 9234).

And, again:

"The law remained in this status until 1940. In considering the Transportation Act of that year, Congress was advised that in the depression period, extending roughly from 1930 to 1940, the Government had been a very large shipper of civilian goods, which were being distributed for relief purposes. There had been a great increase in the amount of land grant deductions since, under the law prior to 1940, the reduced rates applied to all Government property whether military or civilian. Congress reached the conclusion in 1940 that it was unfair to the railroads to require them to apply reduced rates to ordinary civilian goods, and the law was amended * * *." (91 Cong. Rec. 9228).

[34] See the statement of Congressman Holmes at the Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 78th Cong., 2d Sess., on H. R. 4184, pp. 130–131:

"* * * I happened to be a member of this committee at the time of the adoption of the 1940 act, and as a matter of fact a member of the conference committee between the House and the Senate on the adoption and I think for my friend's benefit, the general feeling of most of the members of the committee who had this legislation under consideration, was that there should be an elimination of the land-grant rate; they were of the opinion at that time that the rates should be abolished entirely, but apparently did not have the votes to do it, so we took advantage of the situation and made the best bargain we could to relieve the railroads of a part of the responsibility."

Congress refused to take this drastic step, and went no further than to correct the unduly enlarged use of the land-grant privilege for relief and public works shipments, by restoring the reduction to its initial aim of facilitating the national defense. And, in 1940, the course of the European war, with which we were increasingly concerned, underlined the urgent need for promoting, rather than frustrating, the national defense, in peacetime as well as in war.[35] As Judge Hutcheson said in the District Court (No. 56, R. 25):

> * * * the Act was passed at a time when there existed a threat of involvement

[35] The broad Congressional view of the needs of national defense is discussed in detail, *infra*, at pp. 98–103. For instance, the anti-sabotage acts of 1918 and 1940 broadly defined "war material" and "national defense material" to cover all supplies intended for war or national defense use. Act of April 20, 1918, 40 Stat. 533; Act of November 30, 1940, 54 Stat. 1220, 50 U. S. C. 101–106. The Act of July 2, 1940, 54 Stat. 712, gave broad powers of procurement to the War Department in order "to expedite the strengthening of the national defense;" similarly with the Act of June 28, 1940, 54 Stat. 676, Title II of which also authorized new housing "in connection with the national defense programs." The Export Control Act of 1940 (Section 6 of the Act of July 2, 1940), and the property requisitioning Acts of 1940 (Act of October 10, 1940, 54 Stat. 1090) and 1941 (Act of October 16, 1941, 55 Stat. 742) dealt with export control or requisition "in the interest of national defense" of "any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation;" for Congressional recognition of the breadth of these terms, see *infra*, pp. 102–103. Cf. *Gorin* v. *United States*, 312 U. S. 19, 28.

> of this country in total war on a world-wide stage, the serious nature of which is realized when it is recalled that the threat resulted in an accomplished fact within less than fifteen months from the time Congress acted. The United States along with the world, was a close observer of the methods of waging "total war" and Congress was fully aware that modern wars engage the full resources of belligerent nations.

And the Circuit Court of Appeals for the Seventh Circuit has said, in *Northern Pacific Railway Company* v. *United States,* pending on writ of certiorari, No. 400 (R. 46–47):

> At the time of the enactment of the Transportation Act of 1940, it was obvious that the general needs of security demanded a greatly expanded Army and Navy. Such enlarged military and naval forces would demand supplies and equipment far in excess of the then existing reserves. With the war spreading throughout Europe in 1940, and with the knowledge of the meagre and inadequate military strength of the United States, it is most unrealistic to presume that Congress intended any restrictive meaning of "military and naval property" as used in the Transportation Act of that crucial year. To define "military and naval property" in any narrow sense would be to close one's eyes to the complexities and realities of modern war. We will not impute to Congress such lack of vision.

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* * * Congress acted while total war raged in Europe and in contemplation of our situation if total war came to us, which it did.

3. *Legislative history of the Act of December 12, 1945, 59 Stat. 606 (abolishing all land-grant rates).*—This reading of Congressional land-grant rate policy, as embodied in the Transportation Act, is supported, we believe, by the legislative history of the successive attempts to complete the full repeal of the reduction, which was finally accomplished in Public Law No. 256, 79th Congress, the Act of December 12, 1945, Appendix, *infra*, pp. 115–116. These attempts [36] began with the 77th

[36] 77th Congress: 1. H. R. 5598, proposing to limit the deduction to the transportation of "munitions and implements of war and property necessary of the maintenance and subsistence of the armed forces of the United States"; never acted upon by Committee or House.

2. S. 2144; never acted upon by Committee or Senate.

3. H. R. 6156, to repeal the exception entirely:

Hearings: Hearings before the House Committee on Interstate and Foreign Commerce, 77th Cong., 2d Sess., on H. R. 6156, February 19 and 20, 1942.

Report: H. Rep. No. 1910.

Debate: 88 Cong. Rec. 3729, 3786–3804.

Action: Recommitted by the House to the Committee on Interstate and Foreign Commerce, 88 Cong. Rec. 3804.

78th Congress: 1. S. 638; no action taken by Committee or Senate.

2. H. R. 4184, to repeal the exception entirely:

Hearings: (a) Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 78th Cong., 2d Sess., on H. R. 4184, March 16, 17, 18, 21, 22, 23, 1944. (b) Hearings before a Subcommit-

Congress (1941–1942), and continued through the 78th Congress (1943–1944) and the present Congress, the 79th (1945–1946). Here we need only point out those which bear upon our question. There should first be noted the continued refusal of Congress to repeal the exception for military property so long as the war continued. During the national defense and war periods (1940–1945), the greatly expanded traffic incident to the total national mobilization admittedly brought the railroads to their all-time highest level of earnings, and poverty could no longer be pleaded in chief justification of abolition of reduced Government rates, as the Committee of Three, the Committee of Six, and the railroads had so strenuously urged in 1938 and 1939. Nevertheless, the carriers made

tee of the Senate Committee on Interstate Commerce, 78th Cong., 2d Sess., on H. R. 4184, June 8, 9, 13, 14, August 18, 19, 1944.

Reports: H. Rep. No. 1408; S. Rep. No. 1208.

Debate: 90 Cong. Rec. 4874–4913 (House).

Action: Passed by House; reported favorably to Senate, with amendments, but no action taken by Senate.

79th Congress: H. R. 694, to repeal the exception entirely:

Hearings: None.

Reports: H. Rep. No. 393; S. Rep. No. 552; Conference reports printed in 91 Cong. Rec. 10136–8 and 91 Cong., Rec. 10266.

Debate: 91 Cong. Rec. 4183–4201, 9225–9241, 9303–9308, 9309–9322, 9376–9377, 9383–9396, 10101–10110, 10136–10143, 11266–11273, 10859–10860.

Action: Passed and enacted into law, as amended, to provide prospective repeal from October 1, 1946. Public Law No. 256, Act of December 12, 1945, 59 Stat. 606.

elaborate and repeated presentations of the progressive increase in their land-grant shipments during the war, and pressed upon the Congress the asserted improper breadth of the Government's interpretation of the statute's coverage. But Congress was not persuaded and each bill failed of enactment until, in December 1945, Congress agreed to cut off the land-grant reduction beginning October 1, 1946, when it could not be said "that the war effort will in any way be hampered or handicapped by the repeal of the special rates." See statement of Congressman Boren, 91 Cong. Rec. 11268.[37] The earlier bills met sturdy and successful opposition, particularly in the Senate, because they would have abolished reduced rates during the war. See statements of Senator Wheeler on October 2, 1945, 91 Cong. Rec. 9227, 9233.

In this connection, it is also relevant to note the attitude of the various members of Congress toward the carriers' claim that the Government was improperly stretching the terms "military or naval property." The railroads diligently set forth, in some detail, the controversies which had arisen with respect to lend-lease shipments, raw

[37] Section 2 of the Act of December 12, 1945, provides that "any travel or transportation specifically contracted for prior to such effective date [i. e., October 1, 1946] shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment." The Act does not, therefore, affect the shipments involved in these cases.

materials, supplies for the construction of cargo vessels, and other disputed claims. See Hearings before the House Committee on H. R. 6156, p. 2, 39, 46 *et seq.*, 51; Hearings before the House Committee on H. R. 4184, p. 56, 130–1; Hearings before the Senate Committee on H. R. 4184, p. 23. Another of the major arguments for the total abolition of land-grant rates was the asserted difficulty of interpreting Section 321 (a) without prolonged controversy. See H. Rep. No. 393, 79th Cong., p. 8; H. Rep. No. 1408, 78th Cong., p. 7; 90 Cong. Rec. 4881, 4895–6 (debate on H. R. 4184, 78th Cong); 91 Cong. Rec. 9234, 9304, 11268 (debate on H. R. 694, 79th Cong.). These matters were squarely placed before the Congress and considered by it, both in committee and on the floor. But nowhere in the hearings, the reports, or the debates, is there any indication that any member of Congress, including those who had been members of the 76th Congress and had piloted the Transportation Act, viewed the Government's construction of the military property exception as beyond the intention of the earlier Congress. We do not claim that Congress has ratified or approved the interpretation we urge, since it is clear from the debates on the Act of December 12, 1945, and prior discussion, that Congress intended that these controversies be settled judicially.[38] But, at the very

[38] See, *e. g.* statement of Senator Wheeler:

"It should be made perfectly clear that the passage of the bill resulting in the repeal of land-grant rates will have no

least, one may conclude that Congress has found nothing improper in the Government's reading of Section 321 (a). By like token, it is clear that the lower courts and respondents err in their claim that later Congresses have approved or ratified the narrow interpretation that only actual "munitions of war" were entitled to land-grant rates (No. 56, R. 26, 32).

### B. THE LANGUAGE OF THE STATUTE

Respondents and the courts below have mainly rested on the contention that the words of Section 321 (a) are traditionally so narrow in content as to preclude coverage of the lend-lease shipments here involved. We submit, however, that, in the first place, the meaning of the term "military" depends largely on the context in which it is found; and, secondly, that, under the applicable rules of construction and in accordance with its legislative policy, Section 321 (a) should be interpreted to continue land-grant rates for all Government property moving primarily to advance the national defense.

1. *The term "military" has no standard content.*—As this Court has often observed, statutory terms can only be understood by considering, in addition to the general connotation of the words themselves, "the context, the purposes of

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effect whatever upon the controversy as to the proper classification of this material, provided it is moved prior to the effective date of this proposed act." 91 Cong. Rec. 9234.

the law, and the circumstances under which the words were employed." *Puerto Rico* v. *The Shell Co.*, 302 U. S. 253, 258; cf. *Towne* v. *Eisner*, 245 U. S. 418, 425; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 545; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124. "Military" is such a word. Neither Congressional nor general usage has given it the status of a term of art. Webster's New International Dictionary defines it, in part, as: "Of or pertaining to soldiers, arms, or war; belonging to, engaged in, or appropriate to, the affairs of war; * * *." Funk and Wagnalls Standard Dictionary likewise states: "Of or pertaining to armed forces, arms, or warfare * * *." Under this general rubric can fall any matter pertaining to war or the national defense; the proper meaning in a particular case, be it narrow or broad, must be determined by considerations largely extraneous to the word itself. This, the judicial history of the term "military" (and related terms) abundantly proves. For instance, the term "military forces" or "military establishment" has frequently been held to include the Navy or Marine Corps (*United States* v. *Dunn*, 120 U. S. 249, 252; *United States* v. *Sweeny*, 157 U. S. 281, 284; 31 Op. Atty. Gen. 445, 452; *In the Matter of Stewart*, 30 N. Y. Super. (7 Rob.) 635; *Maclean* v. *Brodigan*, 41 Nev. 468; *In re the Right of Electors*, 41 R. I.

118); a "soldier" has been held also to be a "sailor" (19 Op. Atty. Gen. 586) as well as a member of the Women's Army Corps. *United States v. Williams,* 59 F. Supp. 300, 301 (W. D. N. Y.). A civilian can with propriety sit on an international "military" tribunal.

During and immediately after World War I, it was held that, for the purposes of the Espionage Act of 1917, the "military or naval forces" of the United States included all males subject to or registered under the draft. *Debs* v. *United States,* 249 U. S. 211, 216–7; *Seebach* v. *United States,* 262 Fed. 885, 888 (C. C. A. 8); *White* v. *United States,* 263 Fed. 17 (C. C. A. 6); *Howenstine* v. *United States,* 263 Fed. 1, 4 (C. C. A. 9); *United States* v. *Sugarman,* 245 Fed. 604 (D. Minn.); but cf. *United States* v. *Hall,* 248 Fed. 150, 153 (D. Mont.), and *United States* v. *Mayer,* 252 Fed. 868 (W. D. Ky.). On the other hand, after the last war, some courts held soldiers who died of influenza or pneumonia, rather than while participating in combat, not to be engaged in military or naval service under insurance policies freeing the company from liability where the insured died while so engaged. See *Boatwright* v. *American Life Insurance Company,* 191 Iowa 253, and cases cited. Under Section 13 of the Criminal Code (R. S. 5286; 18 U. S. C. 25), prohiting the launching from our shores of a "military expedition or enterprise" against a nation

with which we are at peace, some courts have adopted the narrow view that there must exist a well organized body, fashioned in the style of an Army unit (*United States* v. *Pena*, 69 Fed. 983 (D. Del.); *United States* v. *Hart*, 74 Fed. 724 (C. C. S. D. N. Y.); *United States* v. *Hughes*, 75 Fed. 267 (D. S. C.)), while others, looking to the purpose of the statute to prevent foreign embroilments, have held any group with hostile aims within the act. *Wilborg* v. *United States*, 163 U. S. 632, 648–54; *United States* v. *Ybanez*, 53 Fed. 536 (C. C. W. D. Tex.); *United States* v. *Murphy*, 84 Fed. 609 (D. Del.); *United States* v. *Tauscher*, 233 Fed. 597 (S. D. N. Y.).[39]

We present these examples, not in approval or disapproval of their specific holdings, but to show that terms such as "military", "military property", and "military use" are elastic and without uniform standard content. Their meaning changes with the times and the legislature's varying intention. As used in the Transportation Act of 1940, these words cannot be given their correct reading without full appraisal of the purposes of Section 321 (a), and the needs of the period in which they were enacted.

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[39] In the Act of October 17, 1940, 54 Stat. 1201, 18 U. S. C. 14 *et seq.*, providing for the registration of certain subversive or foreign controlled organizations, Congress used the term "civilian military activity", and broadly defined it to include, among other things, any form of "organized activity which in the opinion of the Attorney General constitutes preparation for military action."

2. *Only a broad interpretation will harmonize the Congressional purpose with the terms of Section 321 (a).*—As we have shown, a basic purpose of Congress, in enacting Section 321 (a), was to continue the railroads' land-grant obligations for national defense purposes. For over a year, war had been waging in Europe and Africa, and the aims of the Axis powers were becoming plain to all; both legislative and executive branches of the Federal Government were keenly concerned in strengthening our defenses, so that, unlike 1917, we might be fully prepared should the nation be again involved in war. In this setting, it is not difficult to construe the terms "military or naval property of the United States moving for military or naval and not for civil use" so as to further the Congressional purpose without distorting the language Congress employed. In our view, the statute is properly read as adopting the pragmatic test of "use" rather than as covering only a property which is conventionally or "inherently" of a military nature or a military type; under Section 321 (a), "military or naval property" means all Government property which is "moving for military or naval and not for civil use." The terms "military or naval and not for civil use" are intended to spell out the entire field of "national defense use", which, as this Court stated in *Gorin* v. *United States*, 312 U. S. 19, 28, is a generic but definite concept of broad connotation, referring to

the military and naval establishments and related activities of national preparedness. Thus interpreted, all Government property which is being shipped primarily in aid of the war or of national defense is entitled to the land-grant reduction, regardless of the Government agency which has control over it, of the traditional or "essential" nature of the property, or of the civilian or military character of the persons who are ultimately to use it. We submit that this construction is the only one which fully harmonizes the Congressional purpose with the wording of the section.

The opposing construction, which respondents urge, begins with a narrow definition of "military or naval property" and further restricts the scope of the statute by requiring that even this small class of goods be moving solely for use by the Army or the Navy. Such an interpretation unquestionably thwarts the legislative policy of advancing the national defense. It also imputes to a Congress, fully aware of the complex needs of modern war and daily preparing to satisfy those needs in all other fields, an early nineteenth century conception of necessary war supplies.

Nor does the interpretation we urge excise the words "and not for civil use", as respondents have strenuously argued.[40] Congress included this phrase to emphasize that the national defense use

[40] In view of the stress placed by respondents and the lower courts (No. 56, R. 26–27, 32) on this point, it may be well to point out that the conference reports on the Trans-

must be primary, and to preclude a finding of "military or naval use" on the basis of secondary military aspects or considerations. The normal civil functions of the War Department were probably foremost in the Congressional mind. In peacetime, the improvement of rivers and harbors by the War Department is primarily undertaken for the promotion of general commerce and navigation, as this Court has recognized in an earlier land-grant rate case. *Southern Pacific Co.* v. *United States*, 285 U. S. 240, 245 (involving the meaning of "troops"). Similarly, the continual peacetime use of War Department property for disaster relief purposes, or the then recent connection of the War Department with the Civilian Conservation Corps, essentially a relief agency, may have prompted the inclusion of the cautionary words. The phrase further serves the function of making it clear that land-grant rates are not to be applied to arms or munitions moving for disposal unrelated to a military purpose.

The principle of use has been consistently applied in the administration of the act by the General Accounting Office. Thus, the Comptroller General has refused to seek reduced rates for materials shipped in 1941 for a relief project at a military post, certified by the Secretary of War

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portation Act of 1940, which first presented the exception for military or naval property, omit these words in their careful paraphrase of Section 321 (a). See *supra*, p. 66.

as important for military purposes, on the ground that the act appropriating the funds (Emergency Relief Appropriation Act for fiscal year 1941, 54 Stat. 611) had as its prime purpose "to provide for the relief of the needy" and military considerations were subsidiary. 20 Comp. Gen. 438, 442. Coast Guard property has been ruled entitled to reduced rates if moving for purposes connected with the agency's war-time status as a component of the Navy, but not if intended for normal peacetime operations. 20 Comp. Gen. 822.

The District Court has suggested that this interpretation "would obliterate any distinction between the civilian and the military in time of war" (No. 56, R. 25), especially in this day of "total war". It was feared that all Government property would then move at land-grant rates. But we do not contend that "total war" engulfs all Government operations. The statute expressly limits the reduced tariff, even in wartime, to "military or naval property moving for military or naval and not for civil use." It is true that in time of war, by far the larger share of Government property moves for national defense purposes and this was certainly not beyond the contemplation of Congress. But there still remains a substantial portion devoted to non-military ends. The normal activities of Government continue to function, with their normal "housekeeping" needs; the mail is carried and post offices may be built; the business of the

courts remains for the most part the settlement of normal civilian disputes; prisons continue to house ordinary felons; certain flood-control, reclamation and navigation works are constructed to aid commerce, navigation or agriculture; even some relief projects may be continued (cf. Emergency Relief Appropriation Act, fiscal year 1943, 56 Stat. 634), especially in areas more slowly affected by war prosperity, such as Puerto Rico or the Virgin Islands. Cf. Jt. Res. of June 22, 1943, 57 Stat. 161, 541, 617.

Since we place "military or naval property" in apposition to "moving for military or naval and not for civil use", the rule that effect must be given to every word of a statute will probably be urged against us on this point, as well. But respondents forget that Congress can make its meaning clear by using a few more words rather than too few. In any case, there is no need to enter into a battle of opposing rules of construction, for it is clear that the "dominating general purpose" of a statute may not be frustrated by a reading mechanically pieced together by selected rules of interpretation. *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–1. The dominating general purpose of Section 321 (a), to continue cheap transportation of Government property shipped in aid of the national defense, we have already shown.

3. *Narrower interpretations contravene the obvious legislative purposes.*—The construction

for which we contend finds further support in the reasons which compel rejection of each of three narrower alternative readings of Section 321 (a) which can be urged.[41]

1. One such interpretation is that "military or naval property" consists solely of "arms", "munitions of war", or material "inherently" military by nature (See Point IX of brief of respondent in No. 57 in Circuit Court of Appeals). We shall point out how broadly Congress has interpreted "military equipment" in another national defense statute, the requisitioning act.[42] Here, it may be enough to cite the basic Land-Grant Act of July 16, 1892, 27 Stat. 174, 180 (*supra*, p. 54), and the succeeding Army appropriation acts for over thirty years, in which Congress consistently re-

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[41] In our brief in the companion case, *Northern Pacific Railway Co.* v. *United States*, No. 400, we discuss a fourth narrow interpretation of Section 321 (a), i. e., that only property moving for use by military or naval *personnel* is entitled to land-grant rates.

[42] Under Section 6 of the Act of July 2, 1940, 54 Stat. 712, 714, authorizing export control of "any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof" (substantially the same terms as the requisitioning acts of 1940 and 1941, *infra*, p. 102) dresses made of synthetic textiles (*United States* v. *251 Ladies Dresses*, 53 F. Supp. 772 (S. D. Tex.)) and platinum metals (*United States* v. *Rosenberg*, 47 F. Supp. 406 (E. D. N. Y.), 150 F. 2d 788 (C. C. A. 2), certiorari denied, 326 U. S. 752) have been held properly controllable.

ferred to "transportation of troops and *munitions of war and military supplies and property*", thus making it clear, for land-grant purposes, that "military property" can and does include materials other than "munitions of war". Several other statutes have carefully used "munitions" or "arms" when Congress has sought to cover only that limited category of military property.[43] War Department practice has long referred to all of its purchases, of pencils as well as of rifles, as "military supplies". See *Military Laws of the United States,* 8th ed. 1939, and Supp. III, 1939–1944, Sections 1928–1941, 2014–2033. During the war, War Department policy, requiring advantage to be taken of land-grant rates in

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[43] The Joint Resolution of March 14, 1912, 37 Stat. 630, prohibited the export of "*any arms or munitions of war*" to countries in which there was domestic violence. The Neutrality Acts of 1935, 1937, and 1939, all dealt with the exportation of "*arms, ammunition, or implements of war*" to belligerent countries. Jt. Res. of August 31, 1935, c. 837, 49 Stat. 1081; Jt. Res. of May 1, 1937, c. 146, 50 Stat. 121; Jt. Res. of November 4, 1939, c. 2, 54 Stat. 4. The various proclamations issued under these provisions of the Neutrality Acts, since 1935, have not included phosphates. Proc. of April 10, 1936, 49 Stat. 3503; May 1, 1937, 50 Stat. 1834; Proc. of Sept. 5, 1939, 54 Stat. 2629; Proc. of April 9, 1942, 56 Stat. 1948. See for discussions of the term "arms or munitions of war" 29 Op. Atty. Gen. 375; 30 Op. Atty. Gen. 213, 227; 32 Op. Atty. Gen. 132. See also Act of June 25, 1940, c. 427, 54 Stat. 572, 573–4, authorizing R. F. C. to create subsidiary corporations "to purchase and produce equipment, supplies, and machinery, for the manufacture of *arms, ammunition, and implements of war.*"

purchasing, made no distinction whatever between "civilian type" and "military type" goods;[*] the Quartermaster Corps (which purchases clothing, bedding, food, and miscellaneous supplies) applied the same rules as the Ordnance Department. See War Department Procurement Regulations No. 11, par. 1182c, 10 Fed. Reg., sec. 811.1182c. (August 25, 1945, p. 10671.) Furthermore, it is clear that when the War Department proposed to Congress, in 1938, that "military or naval property" continue to be transported at reduced rates, it intended to cover, at the least, all of its own supplies. Hearings on H. R. 10620, 75th Cong., p. 16–17, *supra*, p. 60. Like its near-synonym, "military supplies", the term "military property"—broader in connotation than "military goods" or "military type"—is ample enough to encompass all kinds of supplies intended for military use. Accordingly, raw materials (benzol, lumber), semi-processed goods

[*] It is a mistake to assume that the War and Navy Departments do not purchase "civilian type" goods. Especially in wartime, vast quantities of materials, indistinguishable in character from those used by the general populace, are bought for the official use of the Army and the Navy and the personal use of its members and of the civilians accompanying them. Purchases for Quartermaster stores and commissaries are but a familiar aspect of this practice. For some idea of the myriad types of property procured by the War Department during the war, see War Department Procurement Regulations No. 6, especially Appendix I, partially reprinted in 10 Fed. Reg., sec. 806.603 *et seq.* (August 25, 1945, pp. 10587, *et seq.*).

(copper cable, liquid paving asphalt), and commercial type articles (bowling alley equipment) have been considered by lower courts entitled to the land-grant deduction under Section 321 (a). *Northern Pacific Railway Co.* v. *United States*, now pending on writ of certiorari, No. 400; *Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605 (N. D. Calif.).

2. Another interpretation would read the exception for "military or naval property" to apply only to property shipped by or under the control of the War and Navy Departments. Unlike other defense measures adopted contemporaneously,[45] Section 321 (a) employs the broad terms "military or naval property" and nowhere refers to specific agencies or departments of the Government.[46] There was

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[45] See *e. g.* the Emergency Relief Appropriation Act of 1941, 54 Stat. 611, providing for certifications by the Secretary of War or Navy as to military importance; Act of July 2, 1940, 54 Stat. 712.

[46] The history of the Renegotiation Acts presents an interesting example of the repeated amendments which may be required in a war statute expressly limited to named agencies. The first renegotiation act (Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, April 28, 1942, 56 Stat. 245) limited the renegotiation of war contracts to those made by the War Department, the Navy Department, and the Maritime Commission. By the Revenue Act of 1942, October 21, 1942, 56 Stat. 982, the Treasury Department was added. The Military Appropriation Act, 1944, July 1, 1943, 57 Stat. 347, added the Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company. The Revenue

ample reason for the distinction. Section 321 (a) was intended as permanent legislation, and Congress knew full well that the procurement, distribution, or use of supplies necessary for the national defense might become the province of agencies other than the War and Navy Departments. As far back as 1924, Herbert Hoover, then Secretary of Commerce, had recommended to Congress a central civilian purchasing agency for wartime. See H. Doc. 271, 72d Cong., 1st Sess. (Documents by the War Policies Commission) pp. 30–31.[47] In Great Britain, war supplies were being procured, since 1939, by a civilian Ministry of Supply, and in Canada, the function was allotted to a civilian Ministry of Munitions and Supply. On June 25, 1940, Congress itself had authorized the Reconstruction Finance Corporation to create subsidiary corporations with power, among other things, "to purchase and produce equipment, supplies, and machinery, for the manufacture of arms, ammunition, and implements of war." Act of June 25, 1940, c. 427, 54 Stat. 572, 573–4.[48] It was

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Act of 1943, February 25, 1944, 58 Stat. 78, added the War Shipping Administration. It may be suggested that if section 321 (a) of the Transportation Act of 1940 had named specific agencies, Congress might have been called upon progressively to amend it, as had to be done in the case of the Renegotiation Act.

[47] In 1918, Mr. Justice Brandeis had made a similar suggestion. See Mason, *Brandeis* (1946), pp. 523–4.

[48] This Act was amended, in 1941, to enable these corporations to purchase or produce any supply or article necessary for the national defense or war effort. Act of June 10, 1941, c. 190, 55 Stat. 248, 249.

under this Act, and its amendment, that there were organized Defense Supplies Corporation, Defense Plant Corporation, Metals Reserve Corporation, and the other R. F. C. subsidiaries, which played so vigorous a role in the supply of war materials. The Court will recall the further demands, from many quarters during the war, for centralization of all war procurement, as well as production supervision, in some such civilian agency as the War Production Board. Even those who would not go this far recognized that many types of essential war supplies might better be purchased and handled by units other than the Army and the Navy. Procurement by the Maritime Commission of cargo and transport vessels is perhaps the foremost example. The Office of Strategic Services is another instance, as is the recently created civilian Atomic Energy Commission."[49]

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[49] It is by no means unusual for administration of statutes dealing expressly with the procurement of "military" supplies or "war material" to be vested, in whole or in part, in civilian agencies. For instance, the Secretaries of the Treasury and of Agriculture, and the R. F. C. are authorized to make "emergency purchases of war material abroad", Exec. Order No. 9177, May 30, 1942, 50 U. S. C. App., Supp. V, following sec. 601. Power to requisition certain "military" materials under the Acts of October 10, 1940, and October 16, 1941, as amended, 50 U. S. C. App., Supp. V, 711–724 has been vested in the Secretary of Agriculture (Exec. Order No. 9280, December 5, 1942, 50 U. S. C. App., Supp. V, following Sec. 601), War Food Administrator (Exec. Order No. 9322, March 26, 1943, as amended, 50 U. S. C. App., Supp.

This feeling was current in 1940, and Congress wisely forbore from restricting the continued application of land-grant rates to property under the control of the War and Navy Departments. Members of Congress debating the Act of December 12, 1945, repealing all statutory reduced rates, assumed that the 1940 Act applied to shipments by the Treasury Department, Maritime Commission, Agriculture Department, and War Food Administration (see 91 Cong. Rec. 4183–4201, 10140, cf. H. Rep. No. 393, 79th Cong., pp. 4–5); and the vice-president of the Association of American Railroads publicly took the position that the 1940 Act can apply to agencies other than the War and Navy Departments. Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 78th Cong., 2d Sess., on H. R. 4184, p. 115–6.[50]

3. A related reading, equally unacceptable, would confine the property covered by the reservation in Section 324 (a) to that destined for

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V, following Sec. 601), the War Production Board (Exec. Order No. 8942, November 19, 1941, Exec. Order No. 9024, January 16, 1942; Exec. Order 9040, January 24, 1942, 3 CFR Cum. Supp. pp. 1024, 1079, 1082), and the Economic Defense Board (Exec. Order No. 8900, September 15, 1941, 3 CFR Cum. Supp., p. 1009).

[50] The one court which has expressly discussed the point did not hesitate to apply the statute to shipments by another governmental agency. *Southern Pacific Co.* v. *Defense Supplies Corp.*, 64 F. Supp. 605, 607 (N. D. Calif.) (shipment of benzol by Defense Supplies Corp.)

ultimate use by or under the supervision of armed forces, regardless of the purchasing agency.[51] The difficulty with this interpretation is that it blinds itself to the integral character of modern defense, and assumes the unimportance of the many services and functions essential to or directly supporting an army's operations. The work of armies is, of course, of primary impor-

[51] Judge Hutcheson in the District Court (No. 56, R. 23) agreed that ultimate use by the armed forces of an ally would be sufficient, and that use by American armed forces would not be required. The Court of Claims has also recently held that use by allied armed forces complies with the statute. *Southern Pacific Co.* v. *United States*, Ct. of Claims, Nos. 45952 and 46012, decided October 7, 1946 (automobiles, lend-leased for use in Chinese Army). The Court of Claims stated:

"* * * The United States Government, acting in its sovereign capacity, chose the method it would pursue in the defense of the country, and that defense was inherently military in its nature, in the face of an aggressive, potential enemy. It matters not that it was defense as distinguished from offense. Furnishing of military equipment for the use of the Chinese Army, under the Lend-Lease program, was a sovereign act based on military considerations, and if the same object, the defense of the country, could be obtained by supplying the Chinese Army with military equipment as by supplying it to the Army at home, there is no distinction to be made in the nature of the transportation under the land-grant acts."

In the court below, respondent in No. 56 reserved the point, since its position was that the phosphates were moving for civil and agricultural, and not for military, use in Great Britain, and the Circuit Court of Appeals so held (R. 32). Here, we assume that use by allied armed forces would be admitted to be a military or naval use, for the purposes of Section 321 (a).

tance in wartime, but, to repeat a relevant truism, war of today is fought not only by armies and navies, but on production, economic, political and propaganda fronts. "Economic warfare", a contradiction in terms a century ago, is today a commonplace. As Mr. Bernard M. Baruch, Chairman of the War Industries Board of World War I, told the War Policies Commission, in 1931:

> What it really means is that in the next major conflict the entire population must suddenly cease to be a congeries of individuals, each following a self-appointed course, and become a vast unitary mechanism, composed, in our case, of some 125,000,000 corelated moving parts all working to the end of directing practically all our material resources to the single purpose of victory. Modern war requires that the full power of the Nation be exerted in the shortest possible time not only to the violent beating down of the enemy by any destructive material force we can invent or use, but also to every process of slow and often insidious economic strangulation and political isolation that we can devise and administer.
>
> The battlefield effort (while now only a part of what we shall be called upon to do) has become of itself a monstrous thing. Twentieth century means of transportation, communication, and supply have made possible—and therefore necessary—the massing of men in numbers never before deemed possible. The accelerating progress of

science has created destructive forces which require for their use or for defense against them the products of practically the whole of industry in quantities many times those required for the uses of peace. Thus war requires that, at the very moment when productive effort is deprived of millions of men for military service, the country's facilities for production must be speeded up to disgorge unprecedented volumes of supplies. Civilian morale becomes as important as military morale, and it is necessary to make this cosmic change with the least practicable interference with the normal life of the Nation. Furthermore, the increasing dependence of each principal nation on uninterrupted contacts with practically all other nations entails the necessity—for both offense and defense—of an economic strategy and an intense economic tactics which must include practically every other nation—hostile or neutral—in its far-flung application. [H. Doc. No. 163, 72d Cong., 1st Sess. (War Policies Commission Report) at pp. 31–32, reprinted in Baruch, *American Industry in the War* (1941), pp. 378–9.][52]

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[52] The progressive integration of wartime national economies, and the expanding demands of modern war, exerted such irresistible pressure on the old distinction, in the law of contraband, between the "absolute" and "conditional" categories, that in the war of 1914–1918 all the major belligerents held all commodities essential to the enemy's war effort to be absolute contraband (Turlington, 3 *Neutrality, The World War Period*, pp. 8 *et seq.*, 149: 7 Hackworth,

Similarly, this Court has recently referred, in another connection, to the total effort demanded by "total war in its modern form":

> The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. [*Girouard* v. *United States*, No. 572, Oct. Term, 1945, decided April 22, 1946.]

We have already noted the breadth of congressional interest in national defense during the year 1940 (*supra*, pp. 67–70), and the scope of later war and defense statutes is well known. And, at least since 1930, Congress has been concerned with the needs of total mobilization. The War Policies Commission made studies under its direction (H. Docs. No. 163, 271, 72d Cong., 1st Sess.) and the Special Senate Committee on Investiga-

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*Digest of International Law*, pp. 15–29, 17). Prior to World War II, even ardent proponents of the rights of neutrals did not contest the indefinite extension of contraband lists, but sought to protect neutral commerce by suggesting quota, embargo, certificate, and other such devices. *Research in International Law* (1939), 33 Am. J. Int. Law Supp., pp. 487 *et seq.*; Jessup, 4 *Neutrality, Today and Tomorrow*, Chap. VI.

tion of the Munitions Industry of the 73rd Congress continued these investigations. (See S. Rep. No. 944, 74th Cong., 2d Sess., especially Part 4). Specifically, the course of congressional action provides legislative recognition both of (a) the place of civilian agencies in the military defense of the country and (b) the fact that all types of material and supplies needed for the national defense may properly be designated as of "military" or "naval" value.

(a) The Maritime Commission is an outstanding example of a civilian agency which has always been regarded as directly concerned with the defense of the country and the prosecution of war. Article on Merchant Marine, 10 Encyclopedia of the Social Sciences, p. 343; Anderson, *The Merchant Marine and World Frontiers* (1945), p. 140, 1942–3. "An Army and Navy cannot live and fight in foreign lands and waters without a merchant fleet in support * * *". Record, p. 47, *Northern Pacific Railway Co.* v. *United States,* pending on writ of certiorari, No. 400. This is the view of Congress, as its legislation makes plain. In the Declaration of Policy of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U. S. C. 1101, the national defense takes priority over the development of commerce; ship designs must be submitted to the Navy Department "in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or

otherwise suitable for the use of the United States Government in time of war or national emergency," Merchant Marine Act, 1936, Sec. 501 (b), 46 U. S. C. 1151 (b); and in time of "national emergency" or when the "security of the national defense" makes it advisable, the Commission is empowered to requisition or purchase merchant marine vessels, Merchant Marine Act, 1936, Sec. 902, 46 U. S. C. 1242. During the national defense and war periods, the Commission procured cargo and transport vessels of all kinds, some of which were later turned over to the Army or Navy, and others carried essential war supplies to our allies and our troops overseas. Its importance as a war procurement agency was so obvious that Congress included it without question in the first Renegotiation Act (Sixth Supplemental National Defense Appropriation Act, April 28, 1942, 56 Stat. 245). Congress surely did not intend to exclude material shipped for war vessels under construction for the Maritime Commission from the benefits of reduced rates. Cf. *Northern Pacific Railway Co.* v. *United States, supra* (copper cable shipped for Maritime Commission vessels).

Other instances combine to prove the unreality of limiting the exception in Section 321 (a) to property destined for use by armies, or under army control. The Board of Economic Warfare and the Foreign Economic Administration

engaged in large programs of preclusive buying in neutral countries, not only to obtain strategic or essential materials for ourselves, but also in large part simply to prevent the enemy from acquiring them. Spiegel, *The Economics of Total War* (1942), pp. 51, 295. The Procurement Division of the Treasury Department purchases materials determined by the Secretary of War and the Navy to be strategic and critical, and stockpiles them for use in times of national emergency. Act of June 7, 1939, c. 190, 53 Stat. 811, 50 U. S. C. 98 *et seq.* The Office of War Information ceaselessly conducted propaganda against the enemy's army and home population by radio and pamphlet. The War Shipping Administration directed the repair of the fleet of merchant marine vessels which transported the endless stream of supplies to all theaters of the war. The Selective Service System recruited the civilians who were to make up the Army, the Navy, and the Marine Corps. These were all "civilian" agencies, and their operations, though coordinated with the Army and Navy, were independently carried on. But it cannot be doubted that their war work had the direct and immediate aim of causing the Axis armies to collapse. Such a hostile purpose can hardly be called "civil";[33] there is no difficulty in calling it "military."

[33] "*Pertaining to a citizen in regard to ordinary affairs:* opposed to ecclesiastical or military," [italics supplied] ac-

(b) Congress has likewise shown its understanding that terms such as "military or naval equipment" or "war material" do not, under the conditions of modern war, exclude anything that is necessary for the national defense. The Senate report on the proposed property requisitioning bill (Act of October 16, 1941, 55 Stat. 742, 50 U. S. C. App., Supp. V, 721–724) states that the statutory language[54] was "sufficiently broad to cover generally any property which may be necessary in the preparation of our military and naval defense, without attempting the impossible task of naming the exact articles or materials; and yet sufficiently limited so that it does not include property having no connection with military or naval defense" (S. Rep. 565, 77th Cong., 1st Sess., p. 2). On the Senate floor, Senator Chandler, in charge of the bill, repeatedly emphasized that the statutory terms were "broad enough to cover everything that is necessary to defend the United States" 87 Cong. Rec. 6160. In response to a query whether "any military or naval equipment" was used in a technical sense rather than to include all articles of military or naval value, the Sen-

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cording to Funk and Wagnalls Dictionary of the English language, quoted by Judge Hutcheson in the District Court (No. 56, R. 26).

[54] "any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions."

ator emphatically denied there was any distinction:

> It presupposes that in order to defend the United States the President will find it necessary to obtain the use of any military or naval equipment, or supplies, or anything that is necessary to defend the people of the United States. I will ask again: 'What more are we going to do than to find that the proposed action is necessary; that a delay might invite disaster; and to say that he has exhausted every other means in trying to find a way out, or trying to make arrangements with some persons who can furnish such materials to the Government. [87 Cong. Rec. 6164, July 21, 1941; see also 87 Cong. Rec. 6159 and 6163.]

Again, in providing in 1918 and 1940 for the punishment of the wilful destruction of "war material" and "national defense material", Congress broadly defined these terms to include "arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, or fuel" and "supplies, munitions, and all other articles of whatever description, and any part or ingredient thereof" intended for war or national defense use. Act of April 20, 1918, 40 Stat. 533, and Act of November 30, 1940, 54 Stat. 1220, 50 U. S. C. 101–106.

4. *Section 321 (a) must be construed in favor of the Government rather than of the railroads.*— We believe that the foregoing arguments for accepting the broad reading of the exception in

Section 321 (a), and for rejecting all narrower alternatives, are conclusive. Any doubt, however, should be resolved by the established rule that grants of public property and relinquishments of public interests or privileges are to be liberally construed in favor of the Government and strictly against the donee. *Southern Pacific Co.* v. *United States,* 307 U. S. 393, 401; *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 272; *Southern Ry Co.* v. *United States,* 322 U. S. 72, 76. "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual." *Slidell* v. *Grandjean,* 111 U. S. 412, 437.

This rule applied with full effect to the original all-embracing reduced rate conditions of the grant, as embodied in the Act of June 7, 1924 (*Southern Pacific Co.* v. *United States, supra; Southern Ry. Co.* v. *United States, supra*), but respondents seem to claim that the Government's partial release of its public rights somehow turns the scales wholly in the railroads' favor. In the lower court, the argument appeared to be threefold: first, that the Transportation Act of 1940 and Section 321 (a) constitute "remedial" legislation and "excep-

tions" from their scope must be narrowly construed; secondly, that Section 321 (b) provides full "consideration" for the Government's rate concession and negatives the application of the rule; and, finally, that the exception for "military or naval property" is for the Government's benefit and must, therefore, be construed against the Government. Each of these curious arguments is fallacious.

1. The first misuses the wholesome doctrine that broad regulatory measures correcting a previous mischief are "remedial", and exceptions from the sweep of the regulatory power should therefore be narrowly limited. Obviously, this rule has not the slightest application to a non-regulatory statutory "exception" retaining for the Government an important economic privilege of great value. Nor should Section 321, which was tacked onto an omnibus transportation measure mainly overhauling the Interstate Commerce Act, be construed as in *pari materia* with the regulatory sections of the Act. Cf. *United States* v. *Colorado & N. W. R. Co.*, 157 Fed. 321, 330 (C. C. A. 8) certiorari denied, 209 U. S. 544. Neither can Section 321, in itself be read as solely concerned with relief of the railroads. The policy of the provision flows as much from the "exception" as from the body of the section. The desire of Congress was to continue land-grant rates for national defense, but not for other

Governmental purposes. As our survey of the legislative history suggests, it may well have been an accident of draftsmanship and of the legislative course of the statute that Section 321 cast its provision concerning "military or naval property" in the form of an exception rather than as main text.

2. Respondents' second argument stresses Section 321 (b), requiring a release of all claims to *unpatented* lands as a condition precedent to the effectiveness of Section 321 (a). The legislative history indicates that Subsection (b) was inserted, over the protests of the railroads, at the urging of various Government agencies, particularly the Department of the Interior, which wholly opposed repeal of the land-grant statutes but felt that, at the very least, the roads should at last put an end to their unresolved public land claims. Hearings before a Subcommittee of the Senate Committee on Interstate Commerce, 76th Cong., 1st Sess., on S. 1915, S. 1990 and S. 2294, pp. 5, 57–63, 64–5, 97, 164–5. This action by the carriers was nowhere regarded as adequate "consideration" for abolition, whole or partial, of the reduced rates. Rather, the releases were "given in pursuance of an apparent Congressional purpose to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act of 1940." *Santa Fe Pacific R. Co.* v. *Ickes*, 57 F. Supp. 984, 987

(D. D. C.) reversed on other grounds, 153 F. 2d 305 (App. D. C.) now pending on certiorari Nos. 97 and 98, this Term. Moreover, adequate "consideration" or not, respondents' argument runs full tilt against the judicial history of land-grant rates. The railroads' original obligation to haul Government property at reduced charges was "consideration", in exactly the same sense, for the initial nineteenth century land-grants (*Burke* v. *Southern Pacific Railroad Company*, 234 U. S. 669, 679; *Louisville & Nashville Railroad Company* v. *United States*, 267 U. S. 395, 402), but the Court has not hesitated to apply the general rule favoring the Government. See cases cited *supra*, p. 101. Section 321 (a) stands on no higher footing.

3. The third argument seeks to avoid present application of the rule by bottoming it solely on the familiar explanation that public grants are usually drawn by the interested donee who will presumably protect his own interests. That reason is thought to be absent here,[55] and the rule itself therefore without application. But the reasons for the rule are obviously broader than respondents' claim. History teaches that the ut-

[55] It is clear that from 1938 to 1946 the Association of American Railroads continuously and actively urged, before Congress and its committees, the repeal of land-grant rates; but we are unable to say whether or not its representatives actually participated in the drafting of the exception in Section 321 (a), or approved that wording.

most vigilance is necessary to conserve and protect public property, public land, public rights. As this Court said in *Southern Ry. Co.* v. *United States*, 322 U. S. 72, 76, the latest land-grant rate case: "The records show that the privilege of obtaining the benefit of rates on land-grant routes is a valuable privilege indeed. We cannot assume that the United States intended to surrender any of those benefits * * * unless the purpose to do so was plainly expressed."

## CONCLUSION

For the reasons stated, we respectfully submit that the judgments below are erroneous and should be reversed.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*
JOHN F. SONNETT,
*Assistant Attorney General.*
ROBERT L. WERNER,
PHILIP ELMAN,
*Special Assistants to the Attorney General.*
PAUL A. SWEENEY,
OSCAR H. DAVIS,
HUBERT H. MARGOLIES,
*Attorneys.*

DECEMBER 1946.

# APPENDIX

The Transportation Act of September 18, 1940, 54 Stat. 898, 49 U. S. C. 65 (a), *et seq.*, provides, in part, as follows:

## PART II—RATES ON GOVERNMENT TRAFFIC

### Government to Pay Full Rates

SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; * * *

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such trans-

portation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

Deduction of Overpayments

SEC. 322. Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of 1938, shall

be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

The Lend-Lease Act (Act of March 11, 1941), 55 Stat. 31, 22 U. S. C. 411–419, provides, in part, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as "An Act to Promote the Defense of the United States".

SEC. 2. As used in this Act—

(a) The term "defense article" means—

(1) Any weapon, munition, aircraft, vessel, or boat;

(2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection;

(3) Any component material or part of or equipment for any article described in this subsection;

(4) Any agricultural, industrial or other commodity or article for defense.

Such term "defense article" includes any article described in this subsection: Manufactured or procured pursuant to section 3, or to which the United States or any foreign government has or hereafter acquires title, possession, or control.

(b) The term "defense information" means any plan, specification, design, pro-

totype, or information pertaining to any defense article.

SEC. 3. (a) Notwithstanding the provisions of any other law, the President may, from time to time, when he deems it in the interest of national defense, authorize the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government—

(1) To manufacture in arsenals, factories, and shipyards under their jurisdiction, or otherwise procure, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for the government of any country whose defense the President deems vital to the defense of the United States.

(2) To sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to any such government any defense article, but no defense article not manufactured or procured under paragraph (1) shall in any way be disposed of under this paragraph, except after consultation with the Chief of Staff of the Army or the Chief of Naval Operations of the Navy, or both. The value of defense articles disposed of in any way under authority of this paragraph, and procured from funds heretofore appropriated, shall not exceed $1,300,000,000. The value of such defense articles shall be determined by the head of the department or agency concerned or such other department, agency or officer as shall be designated in the manner provided in the rules and regulations issued hereunder. Defense articles procured from funds hereafter appropriated to any department or agency of the Government, other than from funds authorized

to be appropriated under this Act, shall not be disposed of in any way under authority of this paragraph except to the extent hereafter authorized by the Congress in the Acts appropriating such funds or otherwise.

(3) To test, inspect, prove, repair, outfit, recondition, or otherwise to place in good working order, to the extent to which funds are made available therefor, or contracts are authorized from time to time by the Congress, or both, any defense article for any such government, or to procure any or all such services by private contract.

(4) To communicate to any such government any defense information, pertaining to any defense article furnished to such government under paragraph (2) of this subsection.

(5) To release for export any defense article disposed of in any way under this subsection to any such government.

(b) The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory.

(c) After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant

to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.

(d) Nothing in this Act shall be construed to authorize or to permit the authorization of convoying vessels by naval vessels of the United States.

(e) Nothing in this Act shall be construed to authorize or to permit the authorization of the entry of any American vessel into a combat area in violation of section 3 of the Neutrality Act of 1939.

* * * * * *

SEC. 8. The Secretaries of War and of the Navy are hereby authorized to purchase or otherwise acquire arms, ammunition, and implements of war produced within the jurisdiction of any country to which section 3 is applicable, whenever the President deems such purchase or acquisition to be necessary in the interests of the defense of the United States.

SEC. 9. The President may, from time to time, promulgate such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such department, agency, or officer as he shall direct.

SEC. 10. Nothing in this Act shall be construed to change existing law relating to the use of the land and naval forces of the United States, except insofar as such use relates to the manufacture, procurement,

and repair of defense articles, the communication of information and other noncombatant purposes enumerated in this Act.

The act of December 12, 1945, c. 573, 59 Stat. 606, provides:

* * * That subsection (a) of section 321 of title III, part II, of the Transportation Act of 1940, be, and the same is hereby, amended by striking out the following: "except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or property of such members) when such members are traveling on official duty;" so that said subsection, as so amended, shall read as follows:

"SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of section 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as re-

quiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed."

SEC. 2. The amendment made by section 1 of this Act shall take effect October 1, 1946: *Provided however,* That any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare or charge in effect at the time of entering into such contract of carriage or shipment.

SEC. 3. The Interstate Commerce Commission, in the exercise of its power to prescribe just and reasonable rates, fares, and charges, shall give due consideration to the increased revenues which carriers will receive as a result of the enactment of this Act, so that such increased revenues will be reflected in appropriate readjustments in rates, fares, and charges to shippers.

U. S. GOVERNMENT PRINTING OFFICE 1946